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In the Supreme Court of the United States

OCTOBER TERM, 1996

ERNST & YOUNG LLP, PETITIONER

v.

P. LARUE SIMPSON, RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and numerous other federal statutes confer protections on "employees" but not on partners. The question presented is:

Whether a partner in a *bona fide* general partnership duly created under state partnership law, who enjoys all of the rights of other partners under the partnership agreement, may sue as an "employee" under ADEA and ERISA?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ernst & Young LLP respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 100 F.3d 436. The opinion of the district court denying summary judgment on all but one claim (App., *infra*, 15a-27a) is unreported. The district court's subsequent opinions resolving the employee/partner issue (*id.* at 28a-58a) and the ERISA claim (*id.* at 59a-97a) are reported at 850 F. Supp. 648 and 879 F. Supp. 802, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1996, and a timely petition for rehearing was denied on January 24, 1997 (App., *infra*, 98a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Age Discrimination in Employment Act and the Employee Retirement Income Security Act are set forth at App., *infra*, 99a-100a.

STATEMENT

This case arises out of the involuntary separation of Peyton LaRue Simpson, a certified public accountant ("CPA") who held the position of partner, from the general partnership of Ernst & Young. Simpson, who was 46 years old at the time he was asked to leave, brought suit against the partnership alleging violations of two of the many federal statutes that confer rights on "employees" but not on partners: the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* Simpson also advanced a claim under an Ohio age discrimination statute that grants protections to employees but not to partners. At a bifurcated trial, the district court first determined that Simpson was an employee rather than a partner; the case then proceeded to the merits, and the jury returned a multimillion dollar verdict in Simpson's favor. The court of appeals affirmed, holding that "the

distinction between partners and employees" under a host of federal statutes turns on an evaluation of more than a dozen "common-law principles" drawn from the Uniform Partnership Act. Applying those principles, the court concluded that Simpson qualified as an employee rather than a partner.

A. Background to the Litigation

On October 1, 1989, two "Big Eight" accounting partnerships, Arthur Young & Company ("Arthur Young ", and Ernst & Whinney, merged to form Ernst & Young. App., *infra*, 3a-4a. As a national firm with over 2,000 partners, Ernst & Young established a Management Committee, consisting of 10 to 14 partners and a chairperson, to oversee and manage its day-to-day operations. *Id.* at 6a-7a, 14a, 20a, 30a-31a. Under the terms of the Ernst & Young partnership agreement, the Management Committee was delegated the authority to make decisions — upon a vote of at least two-thirds of its members — concerning the addition or removal of partners, the allocation of partnership profits, and the appointment or removal of the Committee's chairperson. *Id.* at 6a-7a; Def. Exh. 545, § 3(d).

Despite this centralized management structure, the partners of Ernst & Young retained significant authority, including the power to elect 18 of the 23 positions on the Advisory Council, which advises the Management Committee (and which, like the Management Committee, was authorized to make certain decisions but only upon a two-thirds vote). App., *infra*, 30a; Def. Exh. 545, § 5. In addition, partners were entitled to vote on amendments to the partnership agreement, "major combinations" undertaken by the firm (including mergers, asset sales, and purchases that were above a certain size), and dissolution of the partnership. App., *infra*, 32a-33a; Def. Exh. 545, § 17. New York law, which governed the Ernst & Young partnership agreement at issue in this case, permits a partnership to structure its internal affairs and management in this way. App., *infra*, 40a, 42a.

Peyton LaRue Simpson joined Arthur Young as a partner in December 1986 and served as the managing partner of the firm's Cincinnati office. App., *infra*, 4a. Following the merger, Simpson was named Director of Entrepreneurial Services for Ernst

& Young's Cincinnati office, with responsibility for implementing a national strategic plan. *Id.* at 4a, 34a.

Simpson voted for the merger and signed the partnership agreement, thereby becoming a partner in Ernst & Young. App., *infra*, 4a. As such, Simpson was accorded all of the rights of a partner under the Ernst & Young partnership agreement.[1]

Simpson also contributed $84,000 in capital to Ernst & Young. App., *infra*, 31a. Although the firm arranged for Simpson to borrow this money from a bank, and paid interest to partners on their capital contributions, the firm did not guarantee the loan and required that it eventually be repaid in full. *Ibid.* In addition to making this capital contribution, Simpson assumed joint and individual liability for all of the partnership's debts. *Id.* at 32a. During his tenure at the firm, Simpson also held himself out to the public as an Ernst & Young partner (*id.* at 18a, 37a) and represented on his federal tax return that Ernst & Young was a partnership and that he was a partner. *Id.* at 32a.

As a partner in Ernst & Young, Simpson's compensation consisted of two parts: a fixed annual "salary" (which Ernst & Young regarded as an advance distribution of profits), and a final "allocation" of profits. App., *infra*, 32a; 12/9/93 Tr. 492-493. The allocation of profits, which both Simpson and Ernst & Young characterized as a distribution of partnership earnings for federal income tax purposes, was determined by the firm's Management Committee based on the profitability of the partnership as a whole. App., *infra*, 32a; 12/9/93 Tr. 492-493. In setting each partner's allocation, the Management Committee considered performance,

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[1] For simplicity's sake, we refer to the "Ernst & Young partnership agreement" even though there were, in fact, two partnership agreements. The first agreement governed a general partnership called "Ernst & Young" which, at the time of the events underlying this lawsuit, rendered accounting and auditing services and — as required of such partnerships by most state accountancy laws — consisted solely of CPAs. 12/6/93 Tr. 211-213; 12/9/93 Tr. 456; App., *infra*, 4a, 30a. The second agreement governed a general partnership called "Ernst & Young U.S.," which consisted of both CPA and non-CPA partners. App., *infra*, 4a, 30a. As a partner who was also a CPA, Simpson was a signatory to both agreements. *Id.* at 4a.

level of responsibility, years of service, and other factors. App., *infra*, 32a.

Following the merger, Ernst & Young experienced a significant, unanticipated decrease in revenues. 4/26/94 Tr. 220-21; 5/2/94 Tr. 1087-1088; 5/3/94 Tr. 1205; Def. Exh. 565. As a result, the Management Committee decided to seek the resignation of more than 120 partners, including Simpson. App., *infra*, 5a. Ernst & Young also had concerns about Simpson's very low productivity, his questionable professional judgment (because of his failure to make timely repayments on two personal loans from a bank that was an audit client of the partnership), and his poor business decisions relating to the firm's lease of office space. 5/3/94 Tr. 1183, 1193-1204; 5/5/94 Tr. 1657-1658. Thus, in May 1990, pursuant to the partnership agreement, Simpson was asked to resign. App., *infra*, 16a. After he refused, Simpson was separated from the partnership as of December 19, 1990. *Ibid.*

B. Proceedings in the District Court

On March 25, 1991, Simpson filed this action alleging (1) age discrimination in violation of both ADEA and a parallel Ohio statute, Ohio Rev. Code § 4101.17 (Anderson 1989), (2) unlawful discharge for the purpose of preventing the attainment of ERISA benefits and in retaliation for exercising ERISA rights, and (3) unjust enrichment under Ohio common law. App., *infra*, 1a, 28a.

1. Following discovery, the parties filed cross-motions for summary judgment. App., *infra*, 2a. In its motion, Ernst & Young argued that Simpson was a partner or co-owner rather than an employee and that, accordingly, he had no valid claim under ADEA, ERISA, or the Ohio age discrimination law. *Ibid.* Among other things, Ernst & Young identified the following indicia of Simpson's status as a partner: "he was entitled to vote on the merger between Arthur Young and Ernst & Whinney; he voted in favor of creating Ernst & Young; he signed the partnership agreement; he had the right to participate in the management and operation of Ernst & Young subject to the partnership agreement; he was required to make capital contributions to the partnership; he received distributions of the partnership's profits; he was jointly liable with his other partners for the obligations of

the partnership; [and] he reported his income to the [IRS as partnership income] * * * ." *Id.* at 18a.

On March 26, 1993, the district court denied Ernst & Young's motion for summary judgment with respect to Simpson's ADEA, ERISA and Ohio age discrimination claims on the ground that there were genuine issues of material fact concerning Simpson's status as an employee or a partner. App., *infra*, 15a-22a, 25a, 27a.[2] The court acknowledged that "a plaintiff actually holding the status of a general partner is not an 'employee' within the meaning of the ADEA," but stated that merely "labeling [Simpson] a 'partner' does little to illuminate the actual nature of his employment relationship with Ernst & Young." *Id.* at 17a-18a. Instead, the court explained, it was necessary to ascertain "the economic reality of plaintiff's employment relationship with Ernst & Young * * * by examining the totality of circumstances under the standards courts have traditionally used to distinguish employees and partners such as those set forth in the [Uniform Partnership Act] and the dual factors of compensation and control." *Id.* at 19a.

Applying that approach, the district court reviewed various provisions of the Ernst & Young partnership agreement and concluded, among other things, that Simpson "had no voice in the management of Ernst & Young, while more powerful individuals — the Chairman and other members of the Management Committee — held sway over Ernst & Young's destiny." App., *infra*, 19a. The court refused to give any weight to the fact that Ernst & Young's structure for internal governance was the product of voluntary agreement among Ernst & Young's partners (including Simpson), categorically declaring that "[i]t is of *no* significance for purposes of analyzing plaintiff's actual employment relationship with Ernst & Young that plaintiff voted in favor of the merger or signed the partnership agreement." *Id.* at 21a (emphasis added).

2. Having determined that factual issues precluded summary judgment, the district court proceeded to order a bifurcated trial, with the first phase limited to determining whether Simpson was

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[2] The district court granted summary judgment in favor of Ernst & Young on Simpson's unjust enrichment claim. App., *infra*, 25a-27a.

an Ernst & Young "partner" or "employee." App., *infra*, 2a. Shortly thereafter, a United States Magistrate conducted a four-day trial of the first phase, which resulted in a mistrial when the jury deadlocked. *Ibid.* The parties then agreed to re-submit cross-motions for summary judgment addressing the "partner versus employee" issue, taking into account the testimony and exhibits that had been submitted during the trial. *Ibid.*

On April 24, 1994, the court ruled in Simpson's favor, concluding that Simpson qualified as an employee rather than as a partner. App., *infra*, 28a-58a. The court acknowledged that "neither the Supreme Court nor the Sixth Circuit had addressed the proper test to be used to distinguish partners from employees," but drew guidance from this Court's decision in *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318 (1992), which held that "traditional agency law criteria should be used to determine whether the plaintiff was an independent contractor or an employee under ERISA." App., *infra*, 38a-39a. Despite its different context, *Darden*, the court explained, "strongly counsels the use of traditional legal principles to determine" Simpson's status as a partner. *Id.* at 39a. The court elaborated (*id.* at 40a):

> What is pertinent about *Darden*'s agency law test is the Court's comparison of the independent contractor characteristics the claimant possessed to his employee characteristics * * * . No one factor is controlling. The *Darden* rationale also rejects the premise that if the claimant possessed any characteristics of an independent contractor, he could not be considered an employee under the traditional agency law test.

Consistent with this analysis, the court proceeded to examine whether Simpson possessed "the total bundle of partnership characteristics" embodied in the "[t]raditional partnership law concepts" found in New York law or the Uniform Partnership Act. App., *infra*, 44a, 47a (internal quotations omitted) According to the court, most of the traditional characteristics of partners were not present in Simpson's case. *Id.* at 47a-55a. For example, the court found that Simpson's capital contribution was "more akin to a loan than a capital contribution." *Id.* at 47a. In addition, the court concluded that Simpson did not share in the firm's profits and losses because neither his "salary" nor his "allocation" were "calculated as a proportionate share of the firm's profits." *Id.* at

48a; see also *id.* at 49a (faulting the partnership agreement for "fail[ing] to set forth any formula for calculating allocations"). The court further explained that Simpson "had no other indicia of an ownership interest in the firm" such as the power to alter decisions of the chairperson or the Management Committee (*id.* at 49a-51a), had no unconditional "right to examine the firm's records and books" or to learn the compensation of other partners (*id.* at 51a), and had "little, if any, management authority" regarding Ernst & Young's operations (*ibid.*).

In sum, the court concluded that Simpson "ha[d] many qualitative characteristics of an employee and few, if any, attributes of a *bona fide* partner." App., *infra*, 54a. Accordingly, the court held that "Simpson was an employee protected against age discrimination under ADEA." *Ibid.* For the same reasons, the court opined, Simpson was "subject to ERISA protection." *Id.* at 57a.

3. The case proceeded to a trial on the merits of the ADEA claim. App., *infra*, 3a. On May 12, 1994, the jury returned a verdict finding that age was a determining factor in Simpson's discharge and that Ernst & Young's ADEA violation was willful. *Ibid.* The jury awarded Simpson past earnings of $524,746, past benefits of $421,747, future earnings of $1.5 million, and future benefits of $290,782. 10/28/94 Order, at 3.[3]

On September 23, 1994, the court issued a separate opinion disposing of Simpson's ERISA claim. App., *infra*, 59a-97a. Relying on its previous determination that Simpson was an "employee" entitled to bring suit under ADEA and the Ohio age discrimination statute, the court held that Simpson was an "employee" under ERISA. *Id.* at 71a, 73a-75a. The court concluded that Simpson's discharge was intended to interfere with the attainment of ERISA benefits and in retaliation for persistent

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[3] On the basis of the jury's finding that Ernst & Young's ADEA violation was willful, the court also awarded Simpson liquidated damages in an amount equal to his past earnings and past benefits. See 10/28/94 Order, at 3. In the same order, the court awarded Simpson prejudgment interest on past earnings and past benefits under the Ohio age discrimination law. App., *infra*, 3a.

requests for information concerning ERISA benefits, and it awarded him damages of $712,529, which were set off against the ADEA award. *Id.* at 87a-91a, 97a.

C. The Court of Appeals' Decision

The Sixth Circuit affirmed, holding that Simpson "does not qualify as a partner for purposes of the ADEA, ERISA, and Ohio Rev. Code § 4101.17." App., *infra*, 11a. As an initial matter, the court of appeals stated that "the distinction between a 'partner' and an 'employee' under both ADEA and ERISA is a preliminary jurisdictional issue" that may be resolved "as a matter of law" where, as in this case, "the parties stipulated that no conflict of material fact existed as to this issue." *Id.* at 2a.

The court of appeals observed that "neither this circuit nor the Supreme Court ha[s], to date, considered the partner versus employee question." App., *infra*, 9a. It determined that, in analyzing the distinction between employees and partners, it would "evaluate the undisputed facts" against the following, nonexhaustive list of more than a dozen "common-law principles as codified in the" Uniform Partnership Act (*id.* at 10a):

> [1] the right and duty to participate in management; [2] the right and duty to act as an agent of other partners; [3] exposure to liability; [4] the fiduciary relationship among partners; [5] use of the term "co-owners" to indicate each partner's "power of ultimate control;" [6] participation in profits and losses; [7] investment in the firm; [8] partial ownership of firm assets; [9] voting rights; [10] the aggrieved individual's ability to control and operate the business; [11] the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; [12] the extent of that individual's employment security; and [13] other similar indicia of ownership.

Ibid. (footnotes and citations omitted). Without otherwise explaining how the enumerated factors apply to Simpson, the court concluded that "[w]ithin the embrace of the foregoing criteria * * * the plaintiff does not qualify as a partner." *Id.* at 11a.

Judge Daughtrey filed a separate opinion concurring in the result in order "to encourage the legislative branch of our federal government to recognize as well that the realities of today's global

marketplace *no longer* justify distinguishing between 'employees' and 'partners' in all instances." App., *infra*, 14a (emphasis added). She elaborated:

> In an era of small, closely-operated partnerships, it may have been logical to conclude that an employer/partner could not and would not discriminate in employment decisions against himself or herself or against a close friend and business associate. In a world-wide organization like Ernst & Young that employs almost 2200 "partners," however, the nominal co-owners of the company are, by necessity, so far removed from the seat of actual power as to be subject to the reach of the invidious acts that employment discrimination statutes seek to remedy. *Only by statutory modifications redefining the class of individuals to be protected from such mistreatment* can we ensure that hiring, promotion, and firing decisions are undertaken with proper regard for the law of the land.

Ibid. (emphasis added).

REASONS FOR GRANTING THE PETITION

The Sixth Circuit has erroneously decided an issue of immense public importance. It is the first appellate court ever to hold that a member of a large professional-services partnership is in fact not a partner at all but an employee who is covered by ERISA and by a plethora of federal and state employment laws. This is an astounding result that cannot be squared with the rulings of other circuits and that will have an enormous impact on businesses that operate in the partnership form. Nor can the Sixth Circuit's decision to disregard the jurisdictional limits of these laws be justified, as Judge Daughtrey's concurrence suggests, by "the realities of today's global marketplace." Large partnerships were in existence in 1967 and 1974, when ADEA and ERISA were enacted; in any event, it is for Congress, not the courts, to "redefin[e] the class of individuals to be protected" by federal statutes. To correct the manifest errors in the court of appeals' analysis, resolve a significant intercircuit conflict, and bring much-needed clarity to this critically important area of federal law, further review is plainly warranted.

I. THE ISSUE PRESENTED IS RECURRING AND OF ENORMOUS PUBLIC IMPORTANCE

The Sixth Circuit has set forth an unprecedented test for determining whether a member of a professional-services firm that is organized in the partnership form may seek redress as an "employee" under two important federal statutes — ADEA and ERISA — as well as under state age discrimination laws that similarly extend protections only to "employees." Applying that test, the court of appeals concluded that a member of Ernst & Young, a well-established partnership with nationwide operations, is in reality an "employee" who is entitled to recover a multimillion dollar judgment against his former partners. This decision raises issues of profound importance to innumerable partnerships operating across the country.

To begin with, it cannot seriously be disputed that the question whether ERISA and ADEA regulate the conduct of professional-services partnerships in relation to firm members is an important and recurring question of federal law. In 1992, there were approximately 253,000 partnerships in the services industry in the United States. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 545 (115th ed. 1995) ("STATISTICAL ABSTRACT"). Those partnerships included more than 2.1 million individual partners. *Ibid.* The applicability of ERISA alone is likely to have an enormous and wholly unexpected financial impact on these firms, which might be confronted with massive new pension liabilities under the Sixth Circuit's approach.[4] Also of great importance is the question whether ADEA regulates the decisions of partnerships in adding lateral partners, separating existing partners, determining early-retirement policies, allocating firm profits among partners, and otherwise determining the "terms, conditions, or privileges" of partners' "employment." 29 U.S.C. § 623(a)(1). The practical significance of these issues

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[4] Respondent's attorney has already been quoted as saying that the Sixth Circuit's decision leaves Ernst & Young (and presumably all similarly situated partnerships) with "huge exposure" under ERISA, because it means that Ernst & Young "has the same ERISA vesting and funding obligations to partners regarding retirement plans as it does to employees." PUBLIC ACCOUNTING REPORT 7 (Nov. 15, 1996).

is persuasively illustrated by this case, which resulted in a judgment of almost $4 million against a firm that has operated in the partnership form (through its predecessor firms) for more than 90 years.[5]

What is more, the significance of the legal issue resolved by the Sixth Circuit extends far beyond ADEA, ERISA, and Ohio's age discrimination law. ADEA and ERISA are but two of the many federal employment laws that confer protections on "employees" but not on partners. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), prohibits discrimination against "employees" on the basis of race, religion, sex or national origin. The Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), prohibits employers from paying differing wages to "employees" on the basis of their sex. The Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a), makes it unlawful to discriminate against disabled "employees" or against prospective "employees" who are otherwise qualified for a job. And the Family and Medical Leave Act, 29 U.S.C. §§ 2611(3), 2612(a)(1), 2617, confers certain rights to take leave on "employees." Thus, the employee/partner distinction is critical to the applicability of a wide array of federal employment provisions.[6]

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[5] Not surprisingly, 11 large law firm partnerships filed a joint *amicus curiae* brief in the Sixth Circuit pointing out the significance of the partner/employee issue and arguing that Simpson does not qualify as an employee under ADEA and ERISA.

[6] The boundary between employees and partners also defines the jurisdictional reach of numerous other federal statutes that do not regulate employment discrimination. For example, the Occupational Safety and Health Act, 29 U.S.C. §§ 652(6), 654, imposes certain obligations on employers with respect to their "employees." Similarly, employers are required to pay social security and federal unemployment taxes and to withhold income taxes for their "employees." 26 U.S.C. §§ 3121(d), 3306(i), 3401(c). (Simpson, in contrast, was not subject to withholding and paid his own self-employment tax, as partners are required to do under the federal tax laws. 12/7/93 Tr. 93-94, 102-103.) The concept of "employee" is thus a pervasive one in federal law.

The implications of the Sixth Circuit's resolution of the partner/employee issue for liability under *state* law also reaches well beyond Ohio Rev. Code Ann. § 4101.17 (Anderson 1989).[7] Ohio's age discrimination law is hardly unique or even unusual: most states prohibit age discrimination in one form or another. See A. RUZICHO & L. JACOBS, LITIGATING AGE DISCRIMINATION CASES § 1:19-1:71 (1996). In addition, most states have enacted general employment discrimination laws that parallel Title VII. M. ROTHSTEIN, ET AL., EMPLOYMENT LAW, at 191-92 (1994). And "[a]ll 50 states, the District of Columbia, and Puerto Rico have adopted in some form laws prohibiting discrimination in employment based on disability." I B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 266 (3d ed. 1996). Like the federal employment discrimination provisions described above, these state laws typically apply only to "employees." Accordingly, resolution of the issue presented in this case has the potential to determine the reach of a vast body of state law.

Furthermore, the question whether an individual qualifies as a *bona fide* partner arises under federal employment discrimination laws in contexts other than determining who is a proper plaintiff. For example, liability under many federal statutes is not triggered unless an employer has a minimum number of employees. See, *e.g.*, 42 U.S.C. § 2000e(b) (Title VII) (15 or more employees); 29 U.S.C. § 530(b) (ADEA) (20 or more employees). See *Walters* v. *Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660 (1997). Courts must resolve the question whether members of a firm qualify as *de facto* employees in deciding whether a particular business entity is of sufficient size to be subject to these laws. See, *e.g.*, *Burke* v. *Friedman*, 556 F.2d 867 (7th Cir. 1977). Thus, an unduly permissive test of "employee" status will have the effect of extending the employment discrimination laws to entities that Congress never intended to cover.

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[7] The Sixth Circuit's resolution of the partner/employee issue under Ohio law was inextricably bound up with its resolution of that issue under ERISA and ADEA. Indeed, the Sixth Circuit treated the issue as identical under all three statutes. A reversal of the Sixth Circuit's interpretation of ADEA and ERISA accordingly would call for a remand to the Sixth Circuit to reconsider its decision as to Ohio law.

The same issue also arises in employment discrimination lawsuits brought not against partnerships but against *professional corporations*. In that context, the corporation sometimes argues that its shareholders or directors — often lawyers, accountants, physicians, or other professionals — may not bring suit as "employees" under federal employment provisions because they are *de facto* partners. See, *e.g.*, *Hyland* v. *New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2d Cir. 1986). In other cases, the professional corporation argues that its shareholders are *de facto* partners in order to demonstrate that it lacks the requisite number of employees to trigger application of the employment laws. See, *e.g.*, *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984). The cases involving professional corporations are indistinguishable from those involving partnerships, except that it is the *defendant*, not the plaintiff, who asks the court to disregard an organizational form that has been freely chosen and to recharacterize employment status on the basis of various subjective factors.

As if all of that were not enough, empirical trends enhance the practical significance of the issue presented in this case. Professional-services partnerships in this country are growing in size. Between 1980 and 1992, the average size of such partnerships more than doubled. See STATISTICAL ABSTRACT, at 545. As Judge Daughtrey correctly noted, the "era of small, closely-operated partnerships" is a thing of the past. App., *infra*, 14a. See Sikora, *Statutory Protection for the Discriminatorily-Discharged Partner: Two Recent Decisions*, 13 U. DAYTON L. REV. 311, 312 (1988) (noting "the growth of large, service-oriented partnerships" in recent years). This growth in partnership size makes it inevitable that more and more firms will adopt the kind of sensible internal structures — such as a centralized management committee to which the partners delegate substantial decisionmaking authority — that are already commonplace and that the Sixth Circuit concluded had the effect of transforming Simpson into a *de facto* "employee." These trends will also render even more misguided the assumption — reflected in the Sixth Circuit's analysis — "that a 'true' general partnership operates like a New

England Town meeting." *Wheeler* v. *Main Hurdman*, 825 F.2d 257, 273-74 (10th Cir.), cert. denied, 484 U.S. 986 (1987).[8]

Finally, we note that the Sixth Circuit's resolution of the partner/employee issue is especially significant because, to our knowledge, it represents the first time that an appellate court has ever upheld the imposition of liability under the federal employment discrimination and pension laws against a large, established professional partnership based upon the partnership's treatment of a member of the firm. The Sixth Circuit's decision to affirm a multimillion dollar judgment against Ernst & Young is certain to spur many other partners nationwide to challenge decisions concerning the separation or early retirement of partners, the failure to hire lateral partners, the allocation of partnership profits, the funding of pension plans, and a host of other matters that relate to the "terms, conditions, or privileges" of a partner's "employment." The practical importance of this case for large law, accounting, consulting, medical and other partnerships is therefore enormous.[9] It plainly warrants this Court's attention.

II. THE SIXTH CIRCUIT'S HOLDING IS INCONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS

The Sixth Circuit resolved the important issue presented in this case in a manner that conflicts with the decisions of other circuits. See, *e.g.*, Pokora, *Partners As Employees Under Title*

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[8] Although the average size of professional-services partnerships continues to rise, large partnerships engaged in the provision of legal, accounting, or other professional services were an established (and highly visible) feature of the economic landscape at the time that ADEA and ERISA were enacted. For example, petitioner's two predecessor firms each had approximately 200 partners in 1967. See also Wise, *The Auditors Have Arrived*, FORTUNE 151, 152 (Nov. 1960) (in 1960, seven of the "Big Eight" accounting firms had more than 100 partners).

[9] The Sixth Circuit's decision is also likely to have a detrimental impact on third parties. Specifically, the court's casual suggestion (App., *infra*, 10a n.2) that partners who are determined to be *de facto* "employees" might escape liability for the actions of other partners interjects grave uncertainty into the dealings of third parties with partnerships such as Ernst & Young. See also page 30, *infra*.

VII: The Saga Continues, 22 OHIO N.U. L. REV. 249, 250 (1995) (noting that courts have "com[e] to various conclusions" in deciding whether partners may qualify as employees); Outen & Rasner, 2 LAW FIRM PARTNERSHIP & BENEFITS REPORT 4 (Sept. 1996) (stating that "[a] split has emerged in the federal circuits" over whether members of a professional corporation are in fact "partners" outside the coverage of the antidiscrimination laws); Sikora, *supra*, 13 U. DAYTON L. REV. at 328 (noting "present split in the federal courts on classification of partners"). It is essential that this Court resolve the conflict and restore uniformity to this critical area of federal law.

In ruling that Simpson was merely an Ernst & Young "employee," the Sixth Circuit explained that it was "evaluat[ing] the undisputed facts of the instant case against the common-law principles as codified in the UPA." App., *infra*, 10a (footnote omitted). The court of appeals then proceeded to list more than a dozen factors (several of which contain more than one element) that must be analyzed in order to determine whether a nominal partner is in fact an employee. See page 8, *supra*. Having listed these numerous factors, the court summarily concluded that "[w]ithin the embrace of the foregoing criteria, * * * plaintiff does not qualify as a partner." App., *infra*, 11a.

The Sixth Circuit's multi-factor approach to assessing partnership status is at odds with the views of other circuits. The courts of appeals have addressed this issue in three different ways. One approach, adopted by the Second and Eleventh Circuits, is to treat as dispositive the organizational choice of co-venturers (whether partners or shareholders in a professional corporation). A second approach, adopted by the Seventh and Tenth Circuits, is to accord substantial deference to organizational choice while examining, at most, a few key attributes of partnership status. A third approach, adopted recently by the Eighth and Ninth Circuits, is to focus on several attributes while affording no deference to the choice of organizational form. The Sixth Circuit has joined the third group with a vengeance, ruling that courts must examine a lengthy list of factors supposedly derived from the common law and the Uniform Partnership Act.

1. *Organizational Choice As Dispositive.* The conflict is most pronounced with a line of Second Circuit decisions that

categorically refuse to look behind the form of business organization chosen by co-venturers. Thus, in *Hyland* v. *New Haven Radiology Associates, P.C.*, 794 F.2d 793 (1986), the Second Circuit rejected a professional corporation's argument that a discharged physician was in reality a partner excluded from coverage under ADEA. The Second Circuit also rejected the contention that the plaintiff's status as a partner or employee should be evaluated by "consideration of numerous circumstances relating to the work relationship," holding that "the use of the corporate form precludes *any examination* designed to determine whether the entity is in fact a partnership." *Id.* at 797-98 (emphasis added). "The fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation," the court explained, "is no reason for ignoring a form of business organization freely chosen and established." *Id.* at 798. Accord *Johnson* v. *Cooper, Deans & Cargill, P.A.*, 884 F. Supp. 43, 45 (D.N.H. 1994) (following *Hyland*); *Gorman* v. *North Pittsburgh Oral Surgery Associates*, 664 F. Supp. 212, 214 (W.D. Pa. 1987) (same).

The Second Circuit recently reaffirmed its holding in *Hyland*. See *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1538 (2d Cir. 1996). In dismissing the argument of Johnson & Higgins (J&H) that its mandatory retirement policy for members of the company's Board of Directors could not be challenged under ADEA because J&H directors were "*de facto* partners" rather than employees, the court of appeals reiterated its view that it would be improper for a federal court to "'ignor[e] a form of business organization freely chosen and established'" by co-venturers. *Id.* at 1537 (quoting *Hyland*, 794 F.2d at 798). The Second Circuit accordingly rejected as "without merit" J&H's argument that it should "assess whether J&H's owner-director-officers should be treated as partners or employees" by examining their actual role in the company in light of "common law" principles. 91 F.3d at 1538. The Second Circuit's cases are directly at odds with the Sixth Circuit's reasoning in this case.

The Eleventh Circuit's view of the partner/employee issue is similar to the Second Circuit's. In *Hishon* v. *King & Spalding*, 678 F.2d 1022 (1982), rev'd, 467 U.S. 69 (1984), a Title VII suit for sex discrimination brought by an associate who was denied

partnership at a large Atlanta law firm, the plaintiff advanced a number of arguments to support jurisdiction under Title VII, including that (1) King & Spalding partners were equivalent to "employees" (so that elevation from associate to partner was tantamount to an ordinary promotion occurring in the employment relationship); and (2) as an associate, plaintiff qualified as an "employee," and her elevation to partnership was an "employment opportunity" or a "term, condition, or privilege of employment" protected by Title VII. *Id.* at 1026 & n.7. The Eleventh Circuit rejected both arguments.

The Eleventh Circuit acknowledged that "large law partnerships possess many attributes common to corporate forms of business," but it disagreed that these features transformed King & Spalding partners into *de facto* employees. 678 F.2d at 1026. The Eleventh Circuit explained its general "reluctance" to "equate partners with employees" (*id.* at 1028) — even in a large law firm such as King & Spalding with a centralized management structure — as follows:

> King & Spalding operates as a partnership under the laws of Georgia. It files tax returns as a partnership. It is comprised of fifty active partners and employs approximately fifty associates along with other support personnel. It has a lengthy partnership agreement with detailed provisions as to profits, losses, withdrawal, dissolution, etc. *But it is clearly a voluntary association of lawyers for the purpose of practicing law as joint venturers.* The partnership is the appellant's employer; the partners own the partnership; they are not its "employees" under Title VII.
>
> We find a clear distinction between employees of a corporation and partners of a law firm. In making this distinction, we do not presume to exalt form over substance. In this instance, however, *the form is the substance*, and we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII.

Ibid. (emphasis added). This reasoning cannot be squared with the Sixth Circuit's analysis in this case. See also *Holland* v. *Ernst & Whinney*, 35 Empl. Prac. Dec. (CCH) ¶ 34,653 (N.D. Ala. Aug.

17, 1984) (rejecting argument that partner was employee without examination of partner's actual role).

This Court reversed the Eleventh Circuit's ultimate determination that Title VII does not apply to claims by an associate based on alleged sex discrimination in the partnership decision, see *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984), but it did so by accepting only the plaintiff's *second* theory — that, as an associate, she was an "employee" entitled to bring suit under Title VII. The Court expressly declined to reach (467 U.S. at 74 n.4) her alternative basis for jurisdiction: the argument that King & Spalding partners were *de facto* employees. The Eleventh Circuit has specifically acknowledged that this Court's reversal in *Hishon* did not undermine its analysis of the partner/employee issue. See *Fountain* v. *Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1399-1400 (11th Cir. 1991); accord *Wheeler* v. *Main Hurdman*, 825 F.2d 257, 264 (10th Cir.), cert. denied, 484 U.S. 986 (1987).[10]

Although the Court in *Hishon* did not reach the question whether a law firm partner could qualify as an employee under Title VII, Justice Powell filed a concurring opinion in which he took pains to point out that "the Court's opinion should *not* be read as extending Title VII to the management of a law firm by its partners" or as suggesting "that the relationship among partners be characterized as an 'employment' relationship to which Title VII

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[10] In *Fountain*, the Eleventh Circuit concluded that an accountant who was a member/shareholder of a professional corporation was more akin to a partner than to an employee and thus was barred from suing under ADEA. 925 F.2d 1398. The Eleventh Circuit determined that the member/shareholder's status should be based on "the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control, and ownership." *Id.* at 1400-01. In so holding, the Eleventh Circuit expressly disagreed with the Second Circuit's decision in *Hyland*, which the Eleventh Circuit interpreted as "exalt[ing] * * * form over substance" by making resolution of this issue turn solely on what "label" is attached to a claimant. *Id.* at 1400. Although the Eleventh Circuit looked for guidance to its previous *Hishon* decision construing Title VII, it treated the ADEA issue as one of "first impression" because it involved a different statute. *Id.* at 1399-1400.

would apply." 467 U.S. at 79 (Powell, J., concurring) (emphasis added). On the contrary, Justice Powell explained, "[t]he relationship among law partners differs markedly from that between employer and employee — including that between the partnership and its associates." *Ibid.* In a footnote, Justice Powell observed that "[o]f course, an employer may not evade the strictures of Title VII *simply by labeling* its employees as 'partners.'" *Id.* at 79 n.2 (emphasis added). Justice Powell's opinion thus strongly suggests that partners in law firms may not sue as "employees" under the federal employment discrimination laws unless the partnership is merely a sham entity created for the purpose of avoiding the application of such statutes.

2. *Deferential Assessment of Factors.* Consistent with Justice Powell's opinion in *Hishon*, the Seventh and Tenth Circuits have refused to engage in the kind of intrusive second-guessing of partnership arrangements endorsed by the Sixth Circuit in this case. Instead, those circuits have accorded substantial deference to partners' choice of the partnership form, while examining a few key attributes of partnership status to ensure that the partnership is not a sham.

In *Wheeler* v. *Main Hurdman*, the Tenth Circuit refused to recharacterize a partner in a large national accounting firm (with more than 500 partners) as an "employee" within the meaning of various federal employment statutes, including ADEA and Title VII. See 825 F.2d at 264-77. In so holding, the court rejected a proposed multi-factor "economic realities test" for assessing partnership status as too indeterminate and as reflecting the mistaken "assumption * * * that a 'true' general partnership operates like a New England Town meeting." *Id.* at 273-74.[11] The Tenth Circuit explained (*id.* at 273 (citation omitted)):

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[11] The Tenth Circuit thus rejected a test virtually identical to that endorsed by the Sixth Circuit in this case: "The heart of the standard proposed to us is a theory that any individual who is organizationally or economically dominated is an employee. * * * With due respect, those arguments and assumptions are not likely to translate to the real world with any discernible limits." *Main Hurdman*, 825 F.2d at 273.

> Partnerships, as Justice Powell so aptly stated in his concurring opinion in *Hishon*, embody very special relationships and sensitive management concerns *inter se*; however, *de facto* "domination" or "control" of work, clients, billings, and compensation by key partners may be more common than not, and size of the partnership is not necessarily the determinative factor. * * * "Domination" of a partner in assignment and supervision of work, billing, share of profits, and other matters can result from a myriad of wholly practical reasons existing from time to time in any partnership. Furthermore, a certain amount of "domination" may flow from the necessity of an organizational structure even in the smallest partnership. When the EEOC asserts that status depends upon the "individual's ability actually to control factors such as the management of the firm and critical elements of his or her work," we must wonder just how many partners the "actual control" requirement describes in the real world, and if any partnership of any duration would not have employee partners. What the EEOC and Wheeler are describing as true partners are sole proprietors and a limited number of dominant partners nationwide.

Notably, the Tenth Circuit also faulted any test that focuses on "economic realities" as overlooking the fundamental fact that "[p]artner status is supported by agreement — written, oral, or implied — and statutes." 825 F.2d at 274. "Thus," the court reasoned, "'domination' of a partner may consist not of an absence of rights, as with an independent contractor, but of an *abdication* of rights, which may or may not be a temporary submissiveness." *Ibid.* (emphasis added). In addition to stressing the importance of partners' choice of organizational form, the Tenth Circuit stated that it was a "fatal flaw" to overlook the critical importance of partners' liability for acts of the partnership. *Ibid.* "It is no small thing," the court explained, "to be exposed to unlimited liability, to be personally at risk for a partner's mistakes, and to have one's share of profits always potentially conditional upon the outcome of claims, suits and obligations generated by another partner." *Ibid.* While the Tenth Circuit did cite various general characteristics of the particular accounting firm in concluding that Wheeler could not sue as an employee, it did so merely to show that the partnership

was not a sham and that Wheeler was, in fact, a "*bona fide* general partner[]." *Id.* at 277; accord *Maher* v. *Price Waterhouse*, 1985 WL 9500 (E.D. Mo. 1985).[12]

Like the Tenth Circuit, the Seventh Circuit has applied far less exacting judicial scrutiny to the chosen partnership form in resolving issues similar to those presented here. In *Burke* v. *Friedman*, 556 F.2d 867 (1977), the Seventh Circuit considered whether an accounting partnership with four partners and 13 employees was subject to Title VII, which applies only to employers with 15 or more employees. It concluded that, because the partners "manage and control the business and share in the profits and losses" (*id.* at 869), "we do not see how [they] can be regarded as employees rather than as employers who own and manage the operation of the business." *Ibid.*; see also *Hishon*, 678 F.2d at 1028 (noting Seventh Circuit's "hesitation to equate partners with employees"). Accord *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984) (treating attorney-shareholders in professional corporation as "partners" because of the general similarity in their economic circumstances to that of law partners).[13]

3. *Non-Deferential Assessment of Factors.* In two recent decisions, the Eighth and Ninth Circuits have indicated that they

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[12] Even if *Main Hurdman* can be interpreted as focusing on various "common law" attributes of partnership, it is apparent from the result in that case that the Tenth Circuit takes a much broader view of partner status than did the Sixth Circuit here. The accounting partner in *Main Hurdman* was functionally indistinguishable from Simpson (see 825 F.2d at 260-61); yet the Tenth Circuit rejected the argument that she was an employee covered by Title VII and ADEA.

[13] The Sixth Circuit sought to distinguish *Burke*, *Dowd & Dowd*, and *Hyland* on the ground that "[n]one of these cases question[s] the plaintiff's ownership participation in the employing entity." App., *infra*, 11a n.3. But it is precisely because the Second and Seventh Circuits were unwilling to recharacterize the status of co-venturers that they declined to undertake the kind of judicial second-guessing engaged in by the court below. See also *Main Hurdman*, 825 F.2d at 272 n.30 (rejecting similar effort to distinguish *Burke* and *Dowd & Dowd*).

will assess partnership status by evaluating the "substance of the employment relationship" and the "actual duties and role of the individual." *Devine* v. *Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 81 (8th Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3632 (Mar. 7, 1997) (No. 96-1423); *Strother* v. *Southern California Permanente Medical Group*, 79 F.3d 859, 867 (9th Cir. 1996) (court will "analyze the true relationship among partners").[14] Unlike the Sixth Circuit, however, the Eighth and Ninth Circuits focus on a limited number of critical partnership criteria. Thus, in *Devine*, the Eighth Circuit, although purporting to endorse an approach that examines "all relevant factors," focused on whether the individuals in question were compensated "based on the firms's profits," bore "responsibility for firm debts," participated in the management and "set firm policy," and made "contributions to firm capital." 100 F.3d at 82. Similarly, in *Strother*, the Ninth Circuit examined the "the method of compensation," "the 'partner's' responsibility for partnership liabilities," and "the 'partner's' role in management." 79 F.3d at 867.[15]

Although the Sixth Circuit's decision falls generally into this third group of cases, it adds to the confusion by vastly expanding the list of factors that must be evaluated in judging partnership status. For example, in the Sixth Circuit, courts must now assess, in addition to factors examined in other circuits, "the right and

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[14] The Eighth Circuit in *Devine* acknowledged that "courts have taken two approaches" to this issue, but expressly declined to follow the Second Circuit's approach in *Hyland* and *Johnson & Higgins*, according to which the choice of organizational form "is decisive." 100 F.3d at 80; compare *id.* at 82 (Heaney, J., dissenting) (endorsing the rule of *Hyland*).

[15] Even the factors that the Sixth Circuit's approach has in common with other circuits appear to be applied differently by those other courts. For example, the Eighth Circuit in *Devine* rejected the argument that shareholder-directors of a professional corporation were not partners merely because they were "paid a bi-monthly salary," explaining that "this is not enough to make them employees" since their total compensation was (as with Simpson) based on the firm's profits. 100 F.3d at 81. Similarly, the Eighth Circuit noted that while "the ability to participate in firm policy" was an "important factor" in the analysis, "[p]articipation rights" of partners "need not be equal." *Ibid.*

duty to act as an agent of other partners," "the fiduciary relationship among partners," the extent of "employment security," and — most oddly, given its view that mere labels are not significant — the "use of the term 'co-owners' to indicate each partner's 'power of ultimate control[]'." App., *infra*, 10a.

In sum, the Sixth Circuit's decision adopts a far narrower definition of partnership than exists in the Second, Seventh, and Tenth Circuits (and the Eleventh Circuit in Title VII cases). And while the Eighth and Ninth Circuits agree with the Sixth Circuit that the partner/employee issue must be resolved by weighing the actual role of the individual in question, in making that determination they focus on fewer and more basic criteria than the laundry list of factors purportedly examined by the court below. Because the Sixth Circuit's decision conflicts with that of other circuits, this Court's intervention is needed to assure the uniformity of federal law. There is simply no good reason why a partnership that operates in Michigan, Ohio, or Tennessee should be subject to a wide array of new federal requirements and liabilities that would not apply to that partnership in Colorado, Illinois or New York.

This divergence in approach imposes an especially intolerable burden on partnerships, such as Ernst & Young, that conduct business in offices located throughout the United States.[16] Because of the potential for significant exposure to liability, such partnerships might well be forced to conform their operations to the Sixth Circuit's standard nationwide, even though the very same employment statutes have been held *not* to apply to their operations in other circuits. Moreover, the Sixth Circuit's indeterminate approach leaves partnerships with great uncertainty over whether their pension plans for partners are now subject to a myriad of complex ERISA requirements relating to funding, vesting, recordkeeping, and the like, as well as over how to handle withholding and payroll taxes for firm "partners." It is essential that the Court eliminate this uncertainty and confusion.

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[16] Ernst & Young has offices in 38 states and the District of Columbia.

III. THE SIXTH CIRCUIT'S ANALYSIS IS INCORRECT

These untoward results should not be suffered, because the Sixth Circuit's construction of ADEA and ERISA is clearly misguided. The court of appeals was mistaken not only in its general approach to the jurisdictional issue, but also in its analysis of the many factors that it regarded as the *sine qua non* of partnership status. And the Sixth Circuit was egregiously wrong in its ultimate conclusion that Simpson qualified as an "employee."[17]

To understand the flaw in the court of appeals' analysis, it is useful, at the outset, to clarify what is *not* disputed in this case. There is no dispute that ADEA and ERISA cover "employees" only and therefore exclude *bona fide* partners. Like other courts, the Sixth Circuit endorsed this indisputable proposition of law. App., *infra*, 9a. It is of course perfectly sensible that Congress would have excluded partners from the coverage of these statutes. Partners are co-owners of a business who are jointly engaged in an entrepreneurial venture. The federal employment laws were never intended as a vehicle for co-owners to resolve disputes over how to conduct their business.

Equally beyond dispute is the notion that the requirements of ADEA and ERISA cannot be avoided through the simple expedient of creating a sham partnership whereby employees are labeled "partners." Otherwise, any employer could exempt its employees from the protections of the federal employment discrimination laws merely by changing their job titles.

Once these two propositions are accepted, the only remaining question is how courts should go about determining whether an individual who bears the title "partner" is nonetheless an employee. To answer that jurisdictional question, the Sixth Circuit considered a long list "of common-law principles" that have been

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[17] This is not to say that Simpson was without legal recourse if he believed that he was unfairly treated. He could have brought a variety of claims against Ernst & Young under state partnership and contract law, including claims for breach of fiduciary duty and breach of contract. See, *e.g.*, *Smith* v. *Brown & Jones*, 167 Misc.2d 12, 20-21, 633 N.Y.S.2d 436, 442 (1995); *Birnbaum* v. *Birnbaum*, 73 N.Y.2d 461, 466, 539 N.E.2d 574, 576, 541 N.Y.S.2d 746, 748 (1989).

"codified in" the Uniform Partnership Act (UPA) and that, in the court's view, describe the features common to most if not all partnerships. App., *infra*, 10a; see also *id.* at 40a-43a. That approach was mistaken for a number of reasons.

To begin with, the Sixth Circuit's approach is far too demanding. It should be enough, in a case such as this, for a partnership to demonstrate that (1) it is not a sham partnership (created for the purpose of evading the laws governing "employees") and that (2) the plaintiff enjoyed the rights of the other "partners" in the firm. Under that test, Simpson certainly qualified as a partner. The Sixth Circuit did not take issue with the facts that (i) Ernst & Young, the product of a merger of two partnerships that were formed in 1903 and 1906, is a *bona fide* general partnership; (ii) the Ernst & Young partnership agreement, and the governance structure it created, fully comply with New York partnership law; and (iii) Simpson was afforded all of the rights and duties that belonged to other Ernst & Young partners under the partnership agreement. In requiring more of Ernst & Young, the court below simply disagreed with the way in which the partners in Ernst & Young chose voluntarily to govern themselves.[18] It was wholly inappropriate, and contrary to the approach followed by other appellate courts, for the Sixth Circuit to second-guess that business judgment. See, *e.g.*, *Hyland*, 794 F.2d at 798 (refusing to second-guess a "form of business organization freely chosen and established"); *Hishon*, 678 F.2d at 1028 (same); *Holland* v. *Ernst & Whinney*, *supra* (same).

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[18] The fact that Simpson and the other signatories of the Ernst & Young partnership agreement — like partners in most large law and accounting firms — delegated certain of their powers of self-governance to particular *offices and governing committees*, filled by individual partners, does not detract from this conclusion. Because partner compensation, the capital placed at risk by individual partners, and the personal liability of partners for the firm's losses all hinged on whether the partnership as a whole was profitable (which required that it be operated efficiently), it is hardly surprising that Ernst & Young partners elected to structure their affairs in this manner. The Sixth Circuit, however, simply disregarded the many advantages accruing to Simpson and other Ernst & Young partners from this feature of the partnership agreement.

In any event, even if it were appropriate for the Sixth Circuit to insist that all partnerships contain certain essential attributes, the court's reliance on a laundry list of common-law factors drawn from the UPA is indefensible. *First*, it ignores the central, overriding characteristic of the partnership form under the common law: flexibility. Partnerships are, after all, the creature of agreements among partners. And partners have an almost unlimited ability to alter their rights and duties by agreement. See generally A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 1, at 4 (1968) ("[T]he most important [feature of partnership] is malleability: the relations among the partners and the internal structure of the firm can be anything the partners want. Their agreement is determinative * * * ."). This is equally true under New York partnership law. See *Lanier* v. *Bowdoin*, 24 N.E.2d 732, 735 (N.Y. 1939). In view of the almost infinite variety of the partnership form, it makes utterly no sense to test the status of every partner against a lengthy list of supposed attributes of all *bona fide* partners.

Second, and relatedly, the Sixth Circuit's analysis rests on a misunderstanding of the UPA. Approved by the Commissioners of Uniform State Laws in 1914 (and adopted by New York in 1919), the UPA "serves as a 'standard form' contract, which controls the rights and duties among the partners *in the absence of contrary agreement*." II A. BROMBERG & L. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.01(b), at 6:2 (1996) (emphasis added). In other words, the UPA's provisions are nothing more than a series of *default rules* that "are largely subject to alteration by the partnership agreement." *Id.* § 6.01(c), at 6:3; UPA § 18 (stating that, with certain limited exceptions, the "rights and duties of the partners" are "subject to any agreement between them"); New York Partnership Law § 40 (McKinney 1988 & Supp. 1997) (same). The New York Court of Appeals has acknowledged that New York's partnership law provides default rules "applicable only in the absence of an agreement between the partners on the same subject matter." *Lanier*, 24 N.E.2d at 734-35. Once it is recognized that the UPA embodies default rules rather than "common-law principles" embodied in every legitimate partnership, the error of the Sixth Circuit's analysis is plain.

Third, the Sixth Circuit failed to apprehend that even the default rules included in the UPA are not necessarily representative of all or even most partnerships today. The UPA was approved in 1914 during "an era of small, closely-operated partnerships." App., *infra*, 14a (Daughtrey, J., concurring). See II A. BROMBERG & L. RIBSTEIN, *supra*, § 6.02(b), at 6:9. Consistent with that model, the "U.P.A. standard form is * * * based on the *concept of equality*: Partners share equally in the profits of the business (U.P.A. § 18(a)) and in management (§18(e))." II A. BROMBERG & L. RIBSTEIN, *supra*, § 6.01(b), at 6:2-6:3 (emphasis added). Of course, what was representative of partnerships in 1914 is not necessarily common practice today. Moreover, even under the UPA partners remain perfectly free to depart from the rule of equality, and in fact "[t]he equal sharing rule is often altered by the partnership agreement, particularly in professional firms (such as law firms), in which there may be wide variations in the partners' individual contributions to firm profits." *Id.* § 6.02(b), at 6:11. For this reason as well, the Sixth Circuit erred in treating the provisions of the UPA as reflecting pervasive "common-law principles" rather than default rules subject to modification by parties to any partnership agreement.

Fourth, the Sixth Circuit's test is unworkable, because it consists of no fewer than 12 separate factors, many of which are themselves comprised of several subcomponents. See *Walters* v. *Metropolitan Educational Enterprises*, 117 S. Ct. 660, 665 (1997) (rejecting definition of "employee" that would make Title VII's coverage depend upon an "incredibly complex and expensive factual inquiry"); *id.* at 664 (stating that "Congress should be thought to have prescribed" an approach to the jurisdictional issue that is "impossible to administer" "only if the language could bear no other meaning").[19] The uncertainty caused by the Sixth Circuit's test is compounded, moreover, by the court's vague and unelaborated statement that the list is not exhaustive and may be

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[19] Notably, the jury at the separate trial on the employee/partner issue deadlocked when faced with the task of applying a similar multi-factor test, because (as it explained in a note sent to the judge during deliberations) it could not agree on what weight to give to the many factors it was directed to consider. See 12/10/93 Tr. 559-563; 12/14/93 Tr. 2, 17.

supplemented by "other similar indicia of ownership." App., *infra*, 10a. As the Tenth Circuit explained in rejecting a similar multi-factor test:

> A potentially chaotic situation is presented with partners drifting into and out of covered "employee" status, remaining partners all the while, with no one ever quite knowing who is an employee/partner and who is a "pure" partner.

Main Hurdman, 825 F.2d at 274. Judge Daughtrey's separate concurrence only adds to the confusion because it suggests that current law is ambiguous and in need of revision by Congress, apparently in light of economic developments since ADEA and ERISA were enacted. But see note 8, *supra*.

This Court's decision in *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318 (1992), provides no support for the panel's indeterminate approach. To be sure, the Court in *Darden* adopted "a common-law test" for distinguishing employees from independent contractors under ERISA. But as the Sixth Circuit acknowledged, *Darden* adopted a "traditional agency test" that is "directed to the independent contractor/employee issue." App., *infra*, 9a. See also *id.* at 40a. The distinction between independent contractors and employees "arose under the common law in deciding whether a principal was liable under *respondeat superior* for the torts of his agent: such liability attached if the agent was an employee, but not if he was an independent contractor." M. ZIMMER, ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION, at 520 (3d ed. 1994). "Factors employed for that purpose are useless for drawing lines between people who are part of the same enterprise." *Hyland*, 825 F.2d at 272; accord *Devine*, 100 F.3d at 81 n.4.

In addition, the test outlined in *Darden* involved reference to a number of relatively straightforward objective factors, many of which were subject to ready determination — for example, whether the worker in question provided his own tools, the location of the work, the duration of the employment relationship, the method of payment, and the tax treatment of the hired party. 503 U.S. at 323, 327. Indeed, the Court expressly rejected an alternative approach (which included consideration of the worker's "economic bargaining position" vis-a-vis the employer) on the ground that it

would "severely compromise the capacity of companies * * * to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be." *Id.* at 327.

For these reasons, the Sixth Circuit's approach was completely misguided. In determining Simpson's status, the court of appeals should have inquired whether he enjoyed the rights of other partners in a *bona fide* partnership. Under that approach, Simpson certainly qualified as a partner in Ernst & Young, as he represented himself to be in his dealings with clients and the IRS, and not as an employee. Moreover, the same result follows even if one focuses on the key indicia of partnership status.

Sharing in Profits. The Sixth Circuit relied on the district court's conclusion that Simpson had "no share in the profits" of Ernst & Young. App., *infra*, 7a; see also *id.* at 6a. The district court, in turn, relied on the fact that Simpson's compensation consisted of both a monthly "salary" and an annual "allocation" (*id.* at 48a-49a) and the annual allocation was determined by the Management Committee on the basis of such factors as performance, level of responsibility, and years of service. *Id.* at 32a. It also attached significance to the absence in the Ernst & Young partnership agreement of any "specific *formula* for calculating the amount of firm earnings due plaintiff," an omission the court regarded as "leaving plaintiff in the position of an employee whose amount of yearly earnings was subject to the direction of a higher authority." *Id.* at 20a (emphasis added); see also *id.* at 49a.

This analysis reflects a profound misunderstanding of the nature of the compensation decision in modern partnerships. It is common for partnerships to provide partners with periodic cash distributions. See *Hishon*, 467 U.S. at 79 n.3 (1984) (Powell, J., concurring). The testimony at trial established that the allocation provided to partners was ultimately dependent upon the firm's profits. 12/9/93 Tr. 492-493. *It is undisputed that if Ernst & Young had earned no profits in any particular year, Simpson — unlike an employee — would have received no compensation.* Simpson plainly participated in Ernst & Young's profits.

Individual Liability. The Sixth Circuit acknowledged that, by signing the Ernst & Young partnership agreement, Simpson became "jointly and individually liable for the losses of Ernst &

Young." App., *infra*, 10a n.2. Remarkably, however, the court went on to say that "it is questionable if his liability could have been enforced." *Ibid.* There is absolutely no basis for this speculation, and the court cited nothing to support it.

Capital Contribution. As an Ernst & Young partner, Simpson made a substantial capital contribution — $84,000 — to the partnership. The district court brushed this fact aside by asserting that Simpson's contribution was "more akin to a loan than a capital contribution" because Ernst & Young arranged for a bank to lend Simpson the money. App., *infra*, 47a. But it is conceded that Ernst & Young did *not* guarantee this loan and required Simpson to pay it off in a certain number of years (*id.* at 32a), and Simpson himself conceded that this money was "at risk" if the firm sustained serious losses (12/7/93 Tr. 75, 77-78).

In sum, the Sixth Circuit's decision leads to absurd results by permitting persons (such as Simpson) who were signatories to a valid partnership agreement, who indisputably considered themselves and were treated as partners, and who held themselves out as such to third parties, to bring suit against their partnership, claiming mere employee status. It also thwarts congressional will by expanding the jurisdictional reach of federal statutes to cover partners, even though Congress was surely aware of large partnerships at the time these laws were enacted. Compare *Darden*, 503 U.S. at 323 (refusing to adopt a test for "employee" that would "thwart congressional design or lead to absurd results"). Indeed, Judge Daughtrey effectively acknowledged this point in her separate concurrence by calling upon Congress to make "statutory modifications redefining the class of individuals to be protected" from employment discrimination in light of "today's global marketplace." App., *infra*, 14a. We agree completely that the decision whether to subject the governance decisions of *bona fide* partnerships to federal employment laws should be made by Congress and not by the courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

No. 95-3209

United States Court of Appeals
For the Sixth Circuit

P. LARUE SIMPSON, Plaintiff-Appellee,

v.

ERNST & YOUNG, Defendant-Appellant.

On Appeal from the United States District
Court for the Southern District of Ohio

Decided and Filed Nov. 8, 1996.

Before: KRUPANSKY, DAUGHTREY, and MOORE, Circuit Judges.

KRUPANSKY, J., delivered the opinion of the court, in which MOORE, J., joined. DAUGHTREY, J. (p. 18), delivered a separate concurring opinion.

KRUPANSKY, Circuit Judge.

This action concerns the 1990 discharge of an individual from a large accounting firm. Appellee Peyton Larue Simpson ("Simpson") sought federal judicial redress for his termination by appellant Ernst & Young ("Ernst & Young"), alleging federal claims for violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and a supplemental state claim under the Ohio law that bars age discrimination, Ohio Rev. Code § 4101.17 (Anderson 1989).

Simpson filed this lawsuit on March 25, 1991 seeking damages pursuant to ADEA, 29 U.S.C. § 621 *et seq.*, which protects employees who are forty years or older from age-based discrimination. He also sought damages pursuant to ERISA, 29 U.S.C. § 1001 *et seq.*, charging that his termination was intended to deny him participation in certain Ernst & Young retirement plans and was imposed in retaliation for his persistent inquiries

concerning his post-merger retirement benefits. Included in Simpson's complaint were causes of action for violation of the Ohio age discrimination statute, Ohio Revised Code § 4101.17 (Anderson 1989), and for unjust enrichment.

Following discovery, the parties filed cross-motions for summary judgment. Ernst & Young argued that Simpson was a partner rather than an employee of the firm; consequently, his action was not cognizable pursuant to ADEA and ERISA. The district judge to whom the case was initially assigned observed that "labeling plaintiff a 'partner' does little to illuminate the actual nature of his employment relationship with Ernst & Young." He concluded in his well-reasoned opinion of March 26, 1993 that whether Simpson was "an employee within the meaning of the ADEA," turned on "plaintiff's actual role in the management, control, and ownership of Ernst & Young,"—all disputed issues of material fact to be decided by a jury. The district judge bifurcated the case for trial with its first phase limited to determining if Simpson was an Ernst & Young "partner" or "employee." On December 6, 1993, the parties consented to a trial and entry of final judgment of all issues in the case by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

Following the parties' consent order, a four-day jury trial before the court deadlocked, and resulted in a mistrial on December 20, 1993. The parties thereafter agreed to resubmit the case on cross-motions for summary judgment addressing the "partner versus employee" issue upon the testimony, exhibits, and record that had been developed during the jury trial. Upon the record in its entirety, the trial judge decided that Simpson was an "employee" for purposes of ADEA, ERISA, and Ohio Rev.Code § 4101.17. *Simpson v. Ernst & Young*, 850 F. Supp. 648 (S.D. Ohio 1994).

In reviewing this resolution of the ADEA and ERISA claims, this court initially notes that the distinction between a "partner" and an "employee" under both ADEA and ERISA is a preliminary jurisdictional issue. *See Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989). In the absence of a conflict of material fact, it is appropriate for the court to resolve the issue as a matter of law. *Lilley v. BTM Corp.*, 958 F.2d 746, 750 at n. 1 (6th Cir.), *cert. denied*, 506 U.S. 940 (1992). In the instant case, the parties stipulated that no conflict of material fact existed as to this issue

and submitted it to the court on cross motions for summary judgment to be decided as a matter of law. This court reviews that court's determination *de novo*. *Waxman*, 881 F.2d at 240.

Following the resolution of the "partner versus employee" issue, the trial court convened a jury to consider the merits of plaintiff's ADEA claim. On May 12, 1994, the jury returned a verdict wherein it concluded that age had been a "determining factor" in Simpson's discharge and that Ernst & Young's ADEA violation was "willful." The jury awarded plaintiff past earnings, past benefits, future earnings, and future benefits. Although the trial court denied plaintiff prejudgment interest on his federal ADEA claim (because a prevailing plaintiff may not recover both liquidated damages and prejudgment interest under the ADEA), on October 28, 1994, it permitted him to recover prejudgment interest on past earnings and benefits pursuant to the Ohio age discrimination law. Ohio Rev. Code § 4101.17 (Anderson 1989). Earlier, on September 23, 1994, the trial court had addressed plaintiff's ERISA claim and resolved that Simpson's discharge was in retaliation for persistent requests for information concerning his retirement benefits under the merger. The court awarded Simpson ERISA damages which were set off against the ADEA claim. Defendant moved unsuccessfully for judgment notwithstanding the verdict of the jury and a new trial on January 18, 1995, but filed this timely appeal.

The trial court's summary judgment ruling is reviewed *de novo*. *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388 (6th Cir. 1993). The jury verdicts returned in these proceedings are reviewed pursuant to the "sufficient evidence" rule. *See Agristor Leasing v. A.O. Smith Harvestore Prods., Inc.*, 869 F.2d 264, 269 (6th Cir. 1989). The legal issues inherent to the ERISA claim are reviewed *de novo*, and its factual issues are reviewed for clear error. *Schwartz v. Gregori*, 45 F.3d 1017, 1021 (6th Cir.), *cert. denied*, 116 S. Ct. 77 (1995). Resolutions concerning prejudgment interest and front pay are reviewed for abuse of discretion. *Shore v. Federal Express Corp.*, 42 F.3d 373, 380 (6th Cir. 1994).

A brief summary of the facts that gave rise to this controversy reflects that on October 1, 1989, the accounting firm of Arthur Young & Co. ("Arthur Young") merged with Ernst & Whinney to

form a mega-firm known as Ernst & Young. The proposed merger was presented to participating personnel of Certified Public Accountants (CPAs) and non-CPAs, i.e. lawyers, computer analysts, and individuals with advanced academic degrees in business administration in both firms via various pre-merger documents asserting that (1) there would be no major head count or staff reductions as a result of the merger, (2) the merger would result in equitable or better retirement benefits for all concerned, and (3) both predecessor firms anticipated that the merger would result in an increase in cash earnings and significant growth opportunities for all concerned. Upon these representations of the merger promoters, effected personnel were requested to execute commitments styled Agreement of the Parties—U.S. ("U.S.Agreement"), which defined the terms and conditions of their participation in the newly-created firm of Ernst & Young. The U.S. Agreement characterized CPAs as Capital Account Parties and non-CPAs as Investment Account Parties. The CPAs were each required to execute second documents styled Ernst & Young Partnership Agreement ("Partnership Agreement").

Contrary to the circulated pre-merger commitments, an Ernst & Young Management Committee, a council that had been formed in accordance with the complicated documentation of the combined U.S. Agreement and Partnership Agreement, secretly voted within days of the completed merger to eliminate "excess staff capacity" by 5%, and proceeded within the next two months to systematically discharge older partners. (Ex. 30; Tr. 5/24/94 at 1078; Tr. 12/8/93 at 249; Exs. 31-37). Simpson, who was a signatory to both the U.S. Agreement and the Partnership Agreement, was among those individuals requested to resign.

Plaintiff was born on September 27, 1943. Beginning in 1972, he worked for KMG/Main Hurdman ("KMG/MH"), an accounting firm where he had become the managing partner. In December 1986, Arthur Young acquired KMG/MH. He became the Cincinnati Managing Partner for Arthur Young. Following the 1989 merger with Ernst & Whinney, Gerald Hill ("Hill") replaced Simpson as the Cincinnati Managing Partner of Ernst & Young. Simpson was named to the lesser position of Cincinnati Director of Entrepreneurial Services.

It should be noted that, at the time of the merger, the combined firms had a projected unfunded retirement obligation which exceeded $290 million. By eliminating older partners before their interest in this pension vested, the newly-formed firm could avoid substantial unfunded accrued contingent retirement liabilities.

Preliminary to the announcement of its systematic discharge of older partners, the Management Committee had covertly directed the preparation of a comparative study captioned "Comparison of Partner Ages in Fiscal 1990," which included a subsection styled "Partner Resignations and Retirement." Another section considered by the Committee was "The Partner Recommendation Process," which addressed the admission of younger partners. The Committee's analysis ignored reducing partner compensation or freezing new partner admissions in favor of methodically eliminating older partners. Significantly, a member of the Management Committee testified that "it would be dumb" to lower compensation or freeze new partner admissions rather than discharge older partners. He testified further that it was necessary to discharge Simpson and other older partners to make room for the "bright young people." With this reflected mindset, the Management Committee terminated 120 partners over the age of 40 during an ensuing 18-month period while admitting 162 new partners under 40 years of age. Simpson was replaced by a partner under the age of 40.

To justify Simpson's discharge, Ernst & Young advanced a purported conflict of interest arising out of an undisclosed pre-merger personal home loan mortgage that he carried with a bank that subsequently became a firm client. Both the trial court and the jury rejected this argument as pretextual and specious, especially since an Ernst & Young internal investigation had absolved Simpson of any impropriety or wrongdoing. Moreover, the record disclosed that the only material information of interest to the Management Committee prior to terminating Simpson was his age and years of service with the firm, and his tenacity in pursuing his post merger retirement benefits.

In considering the issue of Simpson's status of "partner" or "employee" within the context of the ADEA and ERISA, the trial court found that the promoters of the merger prevailed upon Simpson and other personnel similarly situated to execute

documents designed to centralize all power to manage the newly-created firm and its assets through an intentionally ambiguous business structure calculated to divest Simpson and others similarly situated of all indicia of meaningful partnership participation in the new firm. The characterization of "partner" was a title that carried no legal significance which could be disclaimed when convenient to the defendant's management. Simpson and his similarly situated colleagues were relegated to the position of an employee subject to the virtually absolute, unilateral control of the Management Committee.

To support its conclusion that Simpson was an employee rather than a partner in the newly-created firm of Ernst & Young for purposes of both the ADEA and ERISA, the trial judge found that Simpson had no authority to direct or participate in the admission or discharge of partners or other firm personnel; participate in determining partners or other personnel compensation predicated upon performance levels, responsibility, and years of service with the firm, including his own; participate in the vote for the chairman or the members of the Management Committee; or participate in the firm's profits and losses or share in unbilled uncollected client accounts ("UBT's"). Simpson had no right to examine the books and records of the firm except to the extent permitted by the Management Committee. He was required to execute a will which mandated that his heirs accept as binding the accounts provided by Ernst & Young with no right of inspection or verification. He had no authority to sign promissory notes on behalf of the firm, or pledge, transfer, or otherwise assign his interest in the firm. He was refused access to data concerning various client accounts. He was denied participation in annual performance reviews and other indicia of partnership status.

In sum, the firm's business, assets, and affairs were directed exclusively by a 10 to 14 member Management Committee and its chairman. The Management Committee exercised exclusive control over the admission and discharge of all personnel, including Simpson. It could terminate employees without cause and without a right to appeal such decisions. The Management Committee unilaterally determined the compensation of all personnel, which authority was exercised and executed in total secrecy. Simpson and those similarly situated had no vote for the chairman or the

members of the Management Committee. Instead, the Management Committee appointed its chairman and its chairman appointed the members of the Management Committee. In assessing Simpson's status as a "partner" or "employee," the trial court concluded that:

> Simpson had few, if any, meaningful attributes of a partner. For all practical purposes, he was an employee with the additional detriment of having promised to be liable for the firm's losses. Ernst & Young was free to draft its Partnership Agreement and U.S. Agreement in such a way as to generate the belief in its employees that they enjoyed partnership status and to permit them to represent themselves as partners. However, because these individuals actually had no bona fide ownership interest, no fiduciary relationship, no share in the profits and losses, no significant management control, no meaningful voting rights, no meaningful vote in firm decisions, and no job security, they were not bona fide partners. Therefore Ernst & Young was obligated not to discriminate against them because of their age, sex, race, religion, national origin, or handicap.

In the instant appeal, the defendant has implied that the trial court erroneously applied the "economic realities" test adopted by this circuit in *Lilley v. BTM Corp.*, 958 F.2d 746 (6th Cir.) *cert. denied*, 506 U.S. 940 (1992), in arriving at its decision because *Lilley* was overruled or at least called into question by the Supreme Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992), which mandated "a common-law test for determining who qualifies as an 'employee' under ERISA," and applied agency law principles, *id.* at 323. In its opinion, the trial court expressed some doubt about the continuing vitality of *Lilley* after *Darden*. It is against this backdrop that the court examines the ultimate decision of the trial court.

Initially, it is noted that *Lilley*, like *Darden*, defines the underlying common denominator of the employer/employee rubric as the employer's ability to control job performance and employment opportunities of the aggrieved individual as the most important of many elements to be evaluated in resolving the issue after assessing and weighing all of the incidents of the relationship with no one factor being decisive, as directed in *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968). *See also Goldberg*

v. Whitaker House Cooperative, Inc., 366 U.S. 28, 33 (1961); *NLRB v. Hearst*, 322 U.S. 111, 128-29 (1944).

A panel of this circuit recently concluded that *Lilley's* economic realities test juxtaposed with *Darden's* common-law agency test disclosed no material difference. In *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213 (6th Cir. 1992), the court summarized the controlling law in *Darden*, *Lilley*, and their progenitors by observing:

> In *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983), we .... decided that independent contractors would be covered by Title VII if, under an "economic realities" test, they are susceptible to the types of discrimination Title VII meant to prohibit. Although we did not explain in *Armbruster* what sorts of economic realities would tip the scales toward coverage, other circuits using similar tests have held that the *employer's ability to control the job performance and employment opportunities of the plaintiff is the most important factor*. *See, e.g., Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160-61 (5th Cir. 1986) (affirming dismissal against independent contractor truck driver); *Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 425 (7th Cir. 1986) (reversing dismissal against independent contractor physician denied staff privileges at hospital).

Id. at 218-19 (emphasis added).

The *Eyerman* panel of this court essentially concluded that no substantive conflict between the "economic realities test" as applied in *Lilley*, *see* 958 F.2d at 750 (leaving the determination of employment status to "case-by-case resolution based on the totality of the circumstances"), and *Darden's* mandate, *see* 503 U.S. at 323 ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989)). *See Eyerman*, 967 F.2d at 219 n. 5.

Applying the *Darden* analysis of the master/servant relationship to the instant case, as particularized by the traditional common-law agency doctrine, this appellate consideration reviews

numerous factors impacting the employment relationship to be judged in arriving at a decision with no one decisive factor. Among the elements to be debated in determining the independent contractor/employee question are: the hiring party's right to control the manner and means by which the product is accomplished; the skill required by the hired party; the duration of the relationship between the parties; the hiring party's right to assign additional projects; the hired party's discretion over when and how to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the hiring party's regular business; the hired party's employee benefits; and tax treatment of the hired party's compensation. *Darden*, 503 U.S. at 323-24.

Applying an analog of the Supreme Court's pronouncements in *Darden* to the record in this case, as suggested by Ernst & Young, it is apparent that Simpson does not qualify as a partner for purposes of the ADEA, ERISA, and Ohio Rev. Code § 4101.17, under either the traditional principles of the common-law agency doctrine or the "economic realities" test.

Although the conventional agency test is directed to the independent contractor/employee issue, neither this circuit nor the Supreme Court have, to date, considered the partner versus employee question. In approaching the subject, it is significant to observe that bona fide independent contractors and partners are employers, not employees; and as employers, neither come within the entitlement protection or coverage of either the ADEA or ERISA.

The circuits that have already judged the partner/employee dichotomy have done so by "leaving the determination of employment status to case-by-case resolution based on the totality of the circumstances," *Lilley*, 958 F.2d at 750; *see Darden*, 503 U.S. at 323-24, against the backdrop of the Uniform Partnership Act ("UPA"), that has been adopted by most states, including New York, which provides the applicable law to the agreements here under review. *See generally* N.Y. Partnership Law § 1 *et seq.* (McKinney 1988).

In *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987), the Tenth Circuit analyzed the "total

bundle of partnership characteristics" to distinguish partners from employees. *Id.* at 276. In *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991), the Eleventh Circuit similarly stated:

> [W]e look to the particular circumstances of the case at hand and, in so doing, we focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership.

Id. at 1400-01 (citation omitted).

This court, in addressing the distinction between partners and employees, an issue of first impression within this circuit, evaluates the undisputed facts[1] of the instant case against the common-law principles as codified in the UPA, including, but not limited to: the right and duty to participate in management; the right and duty to act as an agent of other partners; exposure to liability;[2] the fiduciary relationship among partners; use of the term "co-owners" to indicate each partner's "power of ultimate control;" participation in profits and losses; investment in the firm; partial ownership of firm assets; voting rights; the aggrieved individual's ability to control and operate the business; the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; the extent of that individual's employment security; and other similar indicia of ownership. *See Fountain*, 925 F.2d at

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[1] In the absence of a conflict of material fact (as stipulated by the parties), which would be resolved by a jury, it is appropriate for the court to resolve the partner/employee relationship *de novo*. *Cf. Lochman v. Charlevoix*, No. 95-1930, 1996 WL 494579, at *6 (6th Cir. Sep. 3, 1996).

[2] Although the U.S. and Partnership Agreements provide that Simpson was jointly and individually liable for the losses of Ernst & Young, under the facts and circumstances of the instant case, where he had no authority to control the risks undertaken by his "partners," no right to examine the firm's books, and no ability to exercise other ownership attributes, it is questionable if his liability could have been enforced, especially in light of the lack of consideration for his commitment.

1400-01; *Wheeler*, 825 F.2d at 276; *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F. Supp. 144 (S.D.N.Y. 1987).[3]

Within the embrace of the foregoing criteria, this court concludes that the plaintiff does not qualify as a partner for purposes of the ADEA, ERISA, or Ohio Rev. Code § 4101.17 (Anderson 1989). Accordingly, for the reasons stated herein the decision of the trial court to recognize Simpson as an employee in contradistinction to a partner is AFFIRMED.

To support a prima facie case of an ADEA violation, Simpson was required to prove he "lost out *because of his age.*" *O'Connor v. Consolidated Coin Caterers*, 116 S. Ct. 1307, 1310 (1996); *see Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329 (6th Cir. 1994). Without repeating many of the facts already related herein and more comprehensively discussed by the trial court in arriving at its disposition, this court notes that (1) the new firm's unfunded retirement obligation projected to exceed $290 million, (2) the convoluted Partnership and U.S. Agreements which were calculated to create only an illusion that the firm's personnel were partners, and (3) the arrogant and arbitrary treatment accorded Simpson and those similarly situated reflect a design by that the promoters of the merger and, subsequently, the Management Committee to deny Simpson and those similarly situated with him from bona fide partners status.

The jury, after considering the evidence in its entirety, and after assigning greater credibility to the plaintiff's found that the promoters of the Ernst & Young merger had wilfully devised a management structure that was, from its very inception, designed to preclude Simpson and his similarly situated associates from any bona fide ownership interest, fiduciary position, management control, voting rights and privileges, share in the profits, and meaningful vote in firm decisions, including decisions involving job

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[3] Ernst & Young, in support of its position that Simpson was a partner, cites to *Hyland v. New Haven Radiology Associates*, 794 F.2d 793 (2d Cir. 1986); *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984); *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977). None of these cases question the plaintiff's ownership participation in the employing entity.

security. Moreover, by threatening vigorous enforcement of a "noncompete clause" against Simpson to embrace "all clients or potential clients" of Ernst & Young, which had become one of the world's largest professional service firms, defendant effectively foreclosed Simpson from pursuing his profession as a CPA for two years.

From the evidence developed during the course of the trial, which was common to both the ADEA and ERISA claims, a jury could reasonably conclude that age had been a "determining factor" in Simpson's discharge and his termination was wilful, which findings justifiably anchored the jury's award for past earnings, past benefits, future earnings, and future benefits. Accordingly, this court concludes that the jury's verdict was supported by sufficient evidence, was not clearly erroneous, and is AFFIRMED.

A decision to submit the issue of front pay to the jury is committed to the sound discretion of the trial court and is reviewed on appeal for abuse of discretion. *Schwartz v. Gregori*, 45 F.3d 1017, 1023 (6th Cir.), *cert. denied*, 116 S. Ct. 77 (1995); *Shore v. Federal Express Corp.*, 42 F.3d 373, 377-78 (6th Cir. 1994); *Roush v. KFC National Management Co.*, 10 F.3d 392, 398-99 (6th Cir.), *cert. denied*, 115 S. Ct. 56 (1994).

In reviewing the amount of front pay awarded by a jury, the evidence is construed in favor of the prevailing party. In the instant case, plaintiff presented a well-documented economic analysis reflecting the present value of his future damages. Ernst & Young presented no adequate credible explanation to contradict plaintiff's calculations. *See Shore v. Federal Express Corp.*, 777 F.2d 1155, 1159-60 (6th Cir. 1985). The calculations were supplemented by evidence that disclosed the underlying hostility that existed between defendant and Simpson, making reinstatement highly impractical and improbable. This is reflected, for example, by (1) his discharge without notice and without the opportunity of a performance review, (2) the curt, non-informative and arbitrary written responses to his retirement inquiries, (3) the divestiture of the units that he owned in Arthur Young's UBT receivables (unbilled time), and (4) the threat of strict enforcement of the non-compete conditions. In light of the foregoing, the trial court's decision to submit the award of front pay to the jury was not an

abuse of discretion and the amount of the jury's award is supported by sufficient evidence, not clearly erroneous, and is AFFIRMED.

Having observed that the trial court's factual findings inherent to plaintiff's ERISA claims are, on appeal, reviewed for clear error and its legal conclusions are judged de novo to determine if the district court abused its discretion in applying the law to the facts as already discussed herein, this court considers the plaintiff's ERISA claims within the dictates of *Lilley v. BTM Corp.*, 958 F.2d 746 (6th Cir.), *cert. denied*, 506 U.S. 940 (1992). It concludes that the trial court did not abuse its discretion in applying the law to its findings of fact, which survived the clearly erroneous standard of appellate inquiry. The trial court's award of ERISA damages is AFFIRMED.

In Ohio, an award of prejudgment interest is appropriate under circumstances where a party fails to negotiate a good faith settlement. Ohio Rev. Code § 1343.03(C); *Kalain v. Smith*, 495 N.E.2d 572 (1986).

The trial court invoked Ohio Rev.Code § 1343.03(c) upon a record that disclosed a total disinterest on behalf of Ernst & Young to discuss settlement even after the district court dismissed its initial motion for summary judgment seeking a declaration that Simpson was a partner and not an employee. Defendant remained averse to settlement discussion after it became apparent that legal precedent existed supporting plaintiff's position that he was an employee, after a jury mistrial reflected that Simpson's claim had merit, after the court granted plaintiff's motion for summary judgment declaring him to be an "employee" as distinguished from a "partner" in the Ernst & Young firm, and during all phases of the proceedings. Defendant virtually slammed the door of negotiation on innumerable plaintiff overtures to settle the controversy in lieu of continuing protracted, costly legal proceedings.

Upon the record, this court concludes that the trial court did not abuse its discretion in awarding prejudgment interest.

Accordingly, the judgment of the district court is AFFIRMED in its entirety.

MARTHA CRAIG DAUGHTREY, Circuit Judge, concurring.

I concur in the results reached by my colleagues in this matter. I write separately, however, to encourage the legislative branch of our federal government to recognize as well that the realities of today's global marketplace no longer justify distinguishing between "employees" and "partners" in all instances.

In an era of small, closely-operated partnerships, it may have been logical to conclude that an employer/partner could not and would not discriminate in employment decisions against himself or herself or against a close friend and business associate. In a world-wide organization like Ernst & Young that employs almost 2200 "partners," however, the nominal co-owners of the company are, by necessity, so far removed from the seat of actual power as to be subject to the reach of the invidious acts that employment discrimination statutes seek to remedy. Only by statutory modifications redefining the class of individuals to be protected from such mistreatment can we ensure that hiring, promotion, and firing decisions are undertaken with proper regard for the law of the land.

APPENDIX B

C-1-91-196

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

P. LARUE SIMPSON, Plaintiff

v.

ERNST & YOUNG, et al., Defendants.

Filed March 26, 1993

ORDER

Plaintiff LaRue Simpson, a citizen of the Commonwealth of Kentucky, brings this action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626; the Employee Retirement Income Security Act (ERISA), 28 U.S.C. § 1140; Ohio's Age Discrimination in Employment statute, Ohio Rev. Code § 4101.17; and, a claim of unjust enrichment under Ohio common law. Defendant Ernst & Young is an accounting firm licensed in the State of New York with its principal place of business in New York, New York. Defendant does business in the Southern District of Ohio, Western Division.

This matter is before the Court upon plaintiff's motion for partial summary judgment (doc. no. 43), defendant's motion for summary judgment (doc. no. 44), the parties' responses to these actions (doc. nos. 48, 53-56, 81, 84, 90, 95), the parties' proposed findings of fact and conclusions of law (doc. nos. 80, 82, 87, 88), plaintiff's motion to strike (doc. no. 96), defendant's memorandum in opposition (doc. no. 97), plaintiff's motion to file newly discovered evidence (doc. no. 99), and defendant's motion to strike (doc. no. 100). The parties have filed numerous affidavits and

depositions. On December 9, 1992, this court heard oral arguments on the parties' motions for summary judgment.

I.

Plaintiff was born on September 27, 1943. He was practicing certified public accountant from 1968 to 1990. In 1986 he joined the accounting firm of Arthur Young where, in 1987, he became the Office Managing Partner of the Cincinnati, Ohio office.

In 1989, Arthur Young merged with Ernst & Whinney, another accounting firm, becoming the general accounting partnership Ernst & Young, the defendant in this case. Plaintiff voted in favor of the merger. Following the merger plaintiff became Director of Entrepreneurial Services for Ernst & Young's Cincinnati office. He also held administrative responsibility for certain aspects of marketing. His immediate supervisor was Gerald Hill, the Managing Partner of Ernst & Young's Cincinnati office.

In September 1989 plaintiff wrote the first of several memoranda to members of Ernst & Young's Management Committee concerning the impact of the merger upon his retirement benefits. Plaintiff alleges that his written inquiries and the responses he received included an analysis of Ernst & Young's Defined Benefits Retirement Plan.

Plaintiff was not satisfied with the responses he received to his inquiries. On February 7, 1990, one of Ernst & Young's Regional Managers suggested to plaintiff that he "call it a day" on this subject (doc. no. 43, plaintiff's ex. 15).

Although the parties largely dispute the circumstances surrounding the end of their relationship, a few things are clear: Ernst & Young asked plaintiff to resign from the firm in May 1990, plaintiff refused, and on June 19, 1990, plaintiff was notified in writing that he was terminated as a partner at Ernst & Young effective December 19, 1990. Plaintiff was 46 years old. A partner named Donald Fritz assumed plaintiff's position as Director of Entrepreneurial Services in the Cincinnati office. Fritz was under age 40 at the time.

Plaintiff alleges that he had no input concerning his dismissal and that Ernst & Young's Management Committee unilaterally selected plaintiff for termination (doc. no. 43, ex. 2).

Ernst & Young maintains that plaintiff was selected to withdraw from the partnership for legitimate business reasons including unacceptable productivity, lack of technical competence, lack of professional and business judgment, and plaintiff's difficulty in adjusting to the merger, especially the fact that he was not selected as the Office Managing Partner in Cincinnati.

Plaintiff claims that his termination violated the ADEA, Ohio Rev. Code § 4101.17, ERISA, and constituted unjust enrichment. He seeks $3,000,000.00 in compensatory damages, and $3,000,000.00 in punitive damages.

II.

The legal standard for consideration and disposition of issues on summary judgment is well settled and is set forth in *Goldstein v. D.D.B Needham*, 740 F. Supp. 461, 463 (S.D. Ohio 1990).

Ernst & Young contends that it is entitled summary judgment in its favor on plaintiff's ADEA claim because plaintiff's status as a partner rather than an employee places him beyond the reach of the ADEA.

The ADEA prohibits an employer from discharging an employee, who is at least 40 years of age, on the basis of his or her age. 29 U.S.C. §§ 623(a), 631(a); *Lilley v. BTM Corp.*, 958 F.2d 746, 752 and n.3 (6th Cir.), *cert. denied*, ___ U.S. ____, 61 U.S.L.W. 3301 (1992). The ADEA defines "employee" by the following circular generality: "the term "employee" means "an individual employed by an employer..." 29 U.S.C. § 630(f). This definition "leave[s] great room for interpretation..." *E.E.O.C. v. First Catholic Slovak Ladies Ass'n.*, 694 F.2d 1068, 1069 (6th Circ. 1982), *cert. denied*, 464 U.S. 819 (1983). The term "employee" as used in the ADEA must be broadly construed "to effectuate the remedial purposes of the ADEA." *Lilley*, 958 F.2d at 750.

Neither the United States Supreme Court nor the Sixth Circuit Court of Appeals has considered the statutory interpretation question of whether a partner is an employee within the meaning of the ADEA. This Court therefore turns to the thorough, well-reasoned opinion in *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987), and finds that when an employer is a general partnership, a plaintiff actually holding the

status of a general partner is not an "employee" within the meaning of the ADEA. *Id.* at 276; *see also Caruso v. Peat, Marwick, Mitchell & Co.*, 717 F.Supp. 218, 221-22 (S.D.N.Y. 1989).

Answering this statutory interpretation question, however, does not automatically entitle Ernst & Young to summary judgment since labelling plaintiff a 'partner' does little to illuminate the actual nature of his employment relationship with Ernst & Young. The Court must therefore determine whether the undisputed material facts construed in plaintiff's favor establish that he was actually an employee or a partner. *See Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1400-01 (11th Cir. 1991); *see also Lilley*, 958 F.2d at 750; *Wheeler*, 825 F.2d at 276; *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793, 800-02 (2d Cir. 1986) (Cardamone, J. dissenting); *Caruso*, 717 F.Supp. at 221-23.

The determination of whether an individual is an employee within the meaning of the ADEA is a mixed question of law and fact which normally can be resolved by the Court. *Lilley*, 958 F.2d at 750 n.1. When genuine issues of material fact exist, however, the question must be resolved by the finder of fact. *See id.*

Ernst & Young contends that plaintiff's status as a partner is seen in the following: he was entitled to vote on the merger between Arthur Young and Ernst & Whinney; he voted in favor of creating Ernst & Young; he signed the partnership agreement; he had the right to participate in the management and operation of Ernst & Young subject to the partnership agreement; he was required to make capital contributions to the partnership; he received distributions of the partnership's profits; he was jointly liable with his other partners for the obligations of the partnership; he reported his income to the Internal Revenue Service by filing a Schedule K-1, a form titled "Partner's Share of Income Credits"; he characterized himself in his resume, prepared after his termination from Ernst & Young, that he was "Partner-in-Charge" of defendant's Entrepreneurial Department; and, in his complaint he judicially admitted his partnership status by repeatedly referring to himself as a former partner with Ernst & Young.

In ADEA cases the United State Court of Appeals for the Sixth Circuit examines that totality of the circumstances to ascertain the economic realities of the parties' employment relationship. *Lilley*,

958 F.2d at 750. In the instant case, the economic reality of plaintiff's employment relationship with Ernst & Young must be ascertained by examining the totality of circumstances under the standards courts have traditionally used to distinguish employees and partners such as those set forth in the UPA and the dual factors of compensation and control. *See Lilley*, 958 F.2d at 750-51; *Fountain*, 925 F.2d at 1401; *Wheeler*, 825 F.2d at 276; *Hyland*, 794 F.2d at 801-802 (Cardamone, J. dissenting).

The UPA sets forth the following characteristics of a partner:

> (1) unlimited liability;
>
> (2) the right to share in profits and participate in management subject to agreement between partners;
>
> (3) the right and duty to act as an agent of the other partners; and
>
> (4) shared ownership.

Wheeler, 825 F.2d at 267 (citations omitted).

Reading the partnership agreement and construing the genuinely disputed material facts in plaintiff's favor, this Court concludes that a genuine dispute exists over whether plaintiff was an employee or a partner. The partnership agreement structured Ernst & Young into several strata of personnel including the Chairman; the ten to fourteen-member Management Committee, of which plaintiff was not a member; an Advisory Council, of which plaintiff was not a member; and, two groups of parties, one of which included plaintiff. *See* doc. no. 43, Ex. 3. The Management Committee controlled Ernst & Young's "business, assets, and affairs..." *Id.* at § 4(a). These broad terms indicate that plaintiff held little, if any, actual power to affect the management of Ernst & Young. *See* doc. no. 43, ex. 3, §§ 3, 4. A genuine issue therefore exists over whether plaintiff was in an employment situation where he had no voice in the management of Ernst & Young, while more powerful individuals — the Chairman and other members of the Management Committee — held sway over Ernst & Young's destiny.

Certain sections of the partnership agreement tend to show that plaintiff's position was that of an employee. Section 20(a), for example, prevented plaintiff from legally binding Ernst & Young

to "any promissory note, draft, bond, or other obligation for the payment of money, or pledge credit or assets of the Firm as surety or guarantee..." *See Stone v. First Wyoming Bank, N.A., Lusk*, 625 F.2d 332, 343 (10th Cir. 1980); *see also* U.P.A. §9; 6 Unif. Laws Ann. 132 (West 1989). Section 20(e) prevented plaintiff from viewing Ernst & Young's books, accounts, or records absent permission of the Management Committee or the Chairman. *See U.S. v. Mandel*, 437 F.Supp. 258 (D.Md. 1977); *see also* U.P.A. § 19; 6 Unif. Laws Ann. 254.

Section 8(b) provided plaintiff with compensation in the form of an annual salary as determined by the Management Committee (doc. no. 43, Ex. 3). Although section 8(b) also provided that the Management Committee would each year determine the amount of Ernst & Young's earning payable to plaintiff, the partnership agreement mandated the Management Committee to consider the amount of plaintiff's annual salary when calculating his yearly share of firm profits. The partnership agreement also failed to set forth a specific formula for calculating the amount of firm earnings due plaintiff, thereby leaving plaintiff in the position of an employee whose amount of yearly earnings was subject to the discretion of a higher authority. This hierarchical compensation system tends to show classic employer/employee bonding. *See Caruso*, 717 F.Supp. at 222.

Plaintiff also had no voting rights concerning who would be on the Management Committee. *See* doc. no. 43, Ex. 3, § 3(a).

Plaintiff was one of over 2,000 "partners" in the United States and one of over 6,000 "partners" worldwide. In light this large number of "partners", plaintiff's status within Ernst & Young was relatively insignificant, especially when the partnership agreement vested so much power in the Chairman and the Management Committee and left plaintiff with so little power over management, control, or compensation. A reasonable juror could conclude, as plaintiff asserts: "Common sense dictates that no firm operates with 2,000 bosses..." (doc. no. 43, motion for partial summary judgment attached, p. 8).

Ernst & Young argues that the instant case is factually parallel to *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987), where the Court of Appeals determined that a general partner in a large

accounting firm was not an employee within the meaning of the ADEA. This Court disagrees. In *Wheeler*, the Court of Appeals determined that the plaintiff was actually a partner because she participated in the defendant's profits and losses, she was exposed to liability, she invested in the firm, she was a partial owner of firm assets, she held voting rights, and only a small percentage of the firm's personnel were admitted to the partnership. 825 F.2d at 276. In the instant case, the Ernst & Young partnership agreement did not provide plaintiff with a similar degree of power or control. *Supra*, pp. 7-9.

Ernst & Young contends that plaintiff's use of the term "partner" in the complaint constitutes a judicial admission of his employment status. Plaintiff's use of the term "partner" in the complaint constitutes a judicial admission only to the extent that the term is used as a label. Since plaintiff has strenuously argued that he was an employee within the meaning of the ADEA throughout the course of this litigation, his use of the term "partner" in his complaint does not constitute an admission that is dispositive of this mixed legal and factual issue. Similarly, the parties' use of the term "partner" to describe plaintiff both before and after his tenure at Ernst & Young is only the beginning point of the analysis of the economic realities presented by plaintiff's employment situation. *See Fountain*, 925 F.2d at 1400-1401. The proper focal point is plaintiff's actual role in the management, control, and ownership of Ernst & Young. *See id.*; *see also Lilley*, 958 F.2d at 750-51; *Wheeler*, 825 F.2d at 276; *Caruso*, 717 F.Supp. at 221-23.

Ernst & Young's remaining contentions lack merit because they focus on plaintiff's situation before the merger. It is of no significance for purposes of analyzing plaintiff's actual employment relationship with Ernst & Young that plaintiff voted in favor of the merger or signed the partnership agreement. It is the actual nature of plaintiff's employment relationship with Ernst & Young that must be ascertained. *Supra*, p. 5.

Lastly, the parties agree that Ohio Rev. Code § 4101.17 is interpreted in accordance with the ADEA. *See Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir. 1988). To the extent therefore that Ernst & Young argues that plaintiff is not an employee within the meaning of Ohio Rev. Code § 4101.17, the

preceding analysis renders the contention meritless at this point in the litigation.

Accordingly, the record contains genuine issues of material fact concerning the issue of whether plaintiff's actual relationship with Ernst & Young was that of an employee or partner within the meaning of both the ADEA and Ohio Rev. Code § 4101.17, and consequently, Ernst & Young is not entitled to summary judgment in its favor.

III.

Plaintiff contends that he is entitled to partial summary judgment in his favor on his claim under the ADEA and Ohio Rev. Code § 4101.17, because he has demonstrated a prima facie case of age discrimination, and because he has shown that Ernst & Young's asserted reasons for discharging plaintiff were pretextual.

Ernst & Young argues that plaintiff has not produced evidence supporting the existence of a prima facie case of age discrimination. Ernst & Young further contends that legitimate non-discriminatory reasons existed for selecting plaintiff for withdrawal, and that plaintiff has not produced evidence showing these reasons to be a pretext for age discrimination.

To establish a prima facie case of age discrimination, plaintiff must demonstrate the following:

(1) he was a member of the protected class (over age 40);

(2) he was subjected to adverse employment action;

(3) he was qualified for the position; and

(4) he was replaced by a younger person.

Lilley, 958 F.2d at 752 (quoting *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940 (6th Cir. 1987)) (other citation omitted).

Construing the evidence in plaintiff's favor, the Court finds that he has met his burden of establishing prima facie case of age discrimination. Plaintiff was 46 years old on the date he was notified of his termination. Since plaintiff did not voluntarily withdraw from Ernst & Young and since the Management Committee terminated the parties' employment relationship (doc. no. 43, Ex. 5), a reasonable juror could conclude that Ernst &

Young subjected plaintiff to an adverse employment action. A reasonable juror could also conclude that plaintiff was qualified for the position of Director of Entrepreneurial Services in Ernst & Young's Cincinnati office based on the evidence indicating that plaintiff had been a practicing certified public accountant since 1967, and that he had held the position of Managing Partner in Arthur Young's Cincinnati office between 1987 and 1989.

Plaintiff has produced affirmative evidence indicating that he was replaced by Donald Fritz, a younger person with working in Ernst & Young's Cincinnati office. Ernst & Young contends that plaintiff cannot show he was replaced by a younger worker because "spreading the former duties of a terminated employee among the remaining employees does not constitute replacement." *Lilley*, 958 F.2d at 752. This contention lacks merit because unlike the situation in *Lilley*, plaintiff was not one of a group of sales personnel with interchangeable responsibilities. Plaintiff was the head of a department still in existence at Ernst & Young and whose management a younger person assumed upon plaintiff's termination. *See* Fritz dep., p. 50-51.

Plaintiff is not entitled to summary judgment in his favor on his age discrimination claims, because the records contains affirmative evidence supporting Ernst & Young's assertion that its decision to require plaintiff to withdraw was based on legitimate non-discriminatory business reasons.[1] *See Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). These reasons include "plaintiff's poor attitude, lack of competence, lack of business development skills, unacceptable integrity/judgment/professional ethics, lack of commitment to the firm, clouded operating perspective and best interests of the firm." (doc. no. 53, p. 18). Whether these reasons constituted a pretext for age discrimination remains a genuinely disputed matter since plaintiff has produced evidence indicating that the reasons were pretextual. For example, Ernst & Young's investigation into certain alleged conflict of interest held by plaintiff resulted in a finding of no conflict, *id.* Hill's aff. at ¶ 5; and, Ernst & Young's alleged concern with plaintiff's low billing hours is opposed by

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[1] *E.g.*, Hill's aff., doc. no. 43, Ex. 8.

plaintiff's assertion that he was on schedule to meet the target number of billing hours required of him, *id.*, plaintiff's aff. at § 19. Plaintiff, moreover, has shown pretext in Ernst & Young's reliance on a certain delinquent loan plaintiff held as a reason for discharge, because Ernst & Young's auditor states that they were not concerned with whether plaintiff held any delinquent loans, but instead they were concerned with whether any conflict existed (Wasco's dep., pp. 35-39).

Accordingly, the records contain genuine disputes over many of the material facts underlying plaintiff's age discrimination claims, and as a result, neither party is entitled to summary judgment on plaintiff claims under the ADEA or Ohio Rev. Code § 4101.17.

IV.

Plaintiff contends that Ernst & Young violated his rights under ERISA by discharging him approximately one year before his retirement benefits would have vested. Plaintiff alleges that in January 1990 the Management Committee instituted a nationwide plan to terminate partners, including plaintiff, to prevent their retirement benefits from vesting. This is shown, in part, because when Ernst & Young was created, its unfunded retirement obligation exceeded $290,000,000.00.

Ernst & Young contends that since plaintiff was a partner and since the partnership agreement, which created the defined benefits plan, was signed only by partners, the plan was not covered by ERISA, and plaintiff cannot be a beneficiary within the meaning of ERISA.

ERISA provides in pertinent part:

> It shall be unlawful for any person to discharge. . . a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefits plan. . . or for the purpose of interfering with the attainment of any right to which such a participant may become entitled to under the plan.

29 U.S.C. § 1140.

Ernst & Young is not entitled to summary judgment in its favor on plaintiff's ERISA claim because a genuine issue exists

over whether plaintiff's termination was due to his numerous inquiries about his retirement benefits. Plaintiff was notified of his termination in early 1990 several months after he had made repeated inquiries about the effect of the merger on his retirement benefits. His termination took effect approximate one year prior to the date his retirement benefits would have vested. Construing this in plaintiff's favor, a reasonable finder of fact could conclude from that Ernst & Young terminated plaintiff to avoid meeting its obligations to plaintiff under the ERISA plan.

Ernst & Young's contentions regarding the fact that plaintiff was a partner and therefore not protected by ERISA lack merit at the summary judgment stage because a genuine dispute exists on the issue of whether plaintiff was an employee or a partner. *Supra*, pp. 11.

Accordingly, Ernst & Young is not entitled to summary judgment in its favor on plaintiff's ERISA claim.

V.

Ernst & Young contends that it is entitled to summary judgment on plaintiff's unjust enrichment claim since, absent either fraud or undue influence, unjust enrichment cannot exist when the partnership agreement set forth the compensation due plaintiff upon his withdrawal from Ernst & Young.

Plaintiff contends that Ernst & Young received a substantial client base at considerable cost to plaintiff when it terminated him and when it enforced a non-compete agreement against him.

Unjust enrichment exists in Ohio "when a person has or retains money or benefits which in justice and equity belong to another." *Alleman v. Mears*, App. No. 1371, 1989 Ohio App. LEXIS 3212 (11th App. D., Aug. 18, 1989) (citing *Hummel v. Hummel*, 133 Ohio St. 520, 528 (1938)); *see also City of Cincinnati v. Cincinnati Reds*, 19 Ohio App. 3d 227, 230 (1987). A plaintiff may not recover when a defendant retains a benefit under the parties' contract unless the plaintiff shows the existence of fraud, illegality, or bad faith. *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 222 (6th Cir. 1992).

Ernst & Young is entitled to summary judgment in its favor on plaintiff's unjust enrichment theory. By entering the partnership

agreement with Ernst & Young, plaintiff agreed to the compensation set forth in Section 11 in the event of his involuntary termination. *See* doc. no. 43, Ex. 3, § 11. Plaintiff also agreed to a non-compete clause in the event of involuntary termination. *See id.* at § 20(d). Plaintiff has produced no affirmative evidence showing that Ernst & Young engaged in fraud, illegality, or bad faith in the forming of the partnership agreement. He may not, therefore, obtain, under a theory of unjust enrichment, that which he contracted away to Ernst & Young. *See Eyerman*, 967 F.2d at 222; *Ullmann v. May*, 147 Ohio St. 468 (1947).

In the event plaintiff establishes his claims under ERISA, to the extent plaintiff seeks to recover the benefits arguably due him under Ernst & Young's Defined Benefits Plan on a breach of contract theory, his state-law claims would be preempted by ERISA. *See Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1274-75 (6th Cir. 1991), *cert. dismissed*, ___ U.S. ___, 113 S.Ct. 2 (1992).

This Court finds that it lacks diversity jurisdiction over plaintiff's state claims as it is undisputed that some Ernst & Young partners are citizens of the Commonwealth of Kentucky. Through those partners, Ernst & Young resides in Kentucky for purposes of diversity jurisdiction analysis. *See Carden v. Arkoma Associates*, 494 U.S. 185, 195 (1990). Since plaintiff is also a Kentucky citizen, diversity jurisdiction is lacking. *See id.* This Court will not exercise supplemental jurisdiction over plaintiff's contract claims, because these state-law claims — unlike plaintiff's age discrimination claims under Ohio Rev. Code § 4101.17 — are not connected to plaintiff's federal age discrimination claims. *See* 28 U.S.C. § 1367(c). Under these circumstances judicial economy would warrant dismissal of plaintiff's state contract claims. As this Court cannot determine whether these claims should be dismissed with prejudice as preempted by ERISA or without prejudice because this Court lacks jurisdiction of the subject matter, the Court determines that summary judgment is not appropriate as to these state claims.

ORDER

The Court hereby **ORDERS** that:

(1) Plaintiff's motion for partial summary judgment (doc. no. 43) is **DENIED**;

(2) Defendant's motion for summary judgment (doc. no. 44) is **GRANTED** as to plaintiff's claim of unjust enrichment and this claim is **DISMISSED** with prejudice.

(3) Defendant's motion for summary judgment (doc. no. 44) is **DENIED** as to plaintiff's federal claims under ERISA.

(4) Defendant's motion for summary judgment (doc. no. 44) is **DENIED** as to plaintiff's claims under the ADEA and Ohio Rev. Code § 4101.17;

(5) Plaintiff's motion to strike (doc. no. 96) is **DENIED** as plaintiff has not shown any prejudice by defendant's late submission of supplemental materials; and,

(6) Plaintiff's motion to submit newly discovered evidence (doc. no. 99) is **GRANTED**;

(7) Defendant's motion to strike (doc. no. 100) is **DENIED**.

IT IS SO ORDERED.

/s/
Herman J. Weber, Judge
United States District Court

APPENDIX C

Case No. C-1-91-96

United States District Court
Southern District of Ohio

Western Division

P. LARUE SIMPSON,

Plaintiff

vs

ERNST & YOUNG,

Defendant.

Filed April 21, 1994.

ORDER

This case is before the Court following motions for summary judgment, arguments thereon, and responsive pleadings. (Docs. 162, 163, 165, 166). Plaintiff P. LaRue Simpson brings this action against Ernst & Young alleging claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*; Age Discrimination By Employers, Ohio Revised Code § 4101.17; the Employee Retirement Income Security Act (ERISA); as well as an Ohio common law unjust enrichment claim. The Court dismissed the latter claim. (Doc. 101).

Simpson contends that he was Ernst & Young's employee; therefore, this Court has jurisdiction over his ADEA, Ohio age discrimination, and ERISA claims. Ernst & Young contends that Simpson was a partner, and, because these statutes apply only to employees, he has no claim as a matter of law. Following denial of both parties' initial motions for summary judgment, they consented to jury trial and entry of final judgment by the Magistrate Judge.

A trial was held on the preliminary jurisdictional issue whether Simpson was an Ernst & Young employee. This resulted in a mistrial when the jury was unable to agree upon a verdict. (Doc. 154). Based on the trial evidence, the parties agreed there are no disputed questions of material fact on the jurisdictional issue and resubmitted it to the Court for summary judgment. The parties also submitted for summary judgment the issue whether Simpson was an employee within the meaning of ERISA. (Id.).

UNDISPUTED FACTS

The following facts are gleaned from the trial evidence and exhibits and are undisputed.

Simpson, a Certified Public Accountant (CPA), was born on September 27, 1943. Ernst & Young is a large accounting firm created in 1989 by the merger of the Ernst & Whinney and Arthur Young accounting firms. Prior to his relationship with Ernst & Young, Simpson was the Managing Partner for Arthur Young's Cincinnati, Ohio office.

I. The Ernst & Young Merger

In June 1989, Arthur Young distributed to its partners a Merger Agreement (Pl. Ex. 73) and an Information Document For Partners (Pl. Ex. 69). The Information Document represented that the "worldwide" combination of Arthur Young and Ernst & Whinney would result in the largest and strongest international professional services firm in the world. (Id., p. 3). The two firms were described as being compatible because, among other things, they "care for individuals by promoting and recognizing them based on performance" and have "mutual respect among partners." (Id., p. 5). Both were estimated to have good increases in their 1990 and 1991 cash earnings, despite merger costs. (Id., p. 36). The Information Document represented that Arthur Young partners would receive equal or better benefits under the Ernst & Young retirement plan. (Id., p. 55). Arthur Young and Ernst & Whinney represented to their partners and the public that the merger was not expected to result in a reduction in partners. (Doc. 144, p. 289).

The merger vote was conducted by signed ballot. Simpson voted in favor of the merger. At the time of the vote, no options were presented for the continuation of Arthur Young, and the

merger was strongly recommended by those in high management positions.

On October 1, 1989, the merger was effected. The merged firm organized itself into two entities: Ernst & Young and Ernst & Young U.S. The Ernst & Young Partnership Agreement (the Partnership Agreement) required the signatories, who are termed "Partners," to be CPAs and to sign a second agreement, the Ernst & Young U.S. Partnership Agreement (the U.S. Agreement). The signatories to the U.S. Agreement were not termed "Partners," but were denominated "Parties" and consisted of individuals who were both CPAs and non-CPAs. The CPAs were referred to as "Capital Account Parties," and the non-CPAs were termed "Investment Account Parties."

II. The Merged Firms' Management

A Management Committee consisting of ten to fourteen Parties and a Chairman was responsible for the management of Ernst & Young U.S. (Pl. Ex. 46, Sec. 3(a), (d)). Its responsibilities included addition or discharge of Parties, decisions on mergers and acquisitions, allocation of earnings among the Parties, and appointment or removal of the Chairman. (Id., Sec. 3(d)). The Chairman selected new members of the Management Committee subject to the approval of the other members of the Management Committee and the Advisory Council. (Id., Sec. 3(a)). The Advisory Council consisted of the Chairman, not more than four members of the Management Committee, and eighteen other members elected by the Parties. (Id., Sec. 5(a)). It served in an advisory capacity to the Management Committee. (Id., Sec. 5(c)).

As an Ernst and Young U.S. Party, Simpson had one vote for each vacancy on the Advisory Council. (Id., Sec. 5(b)). A Nominating Committee, appointed by the Management Committee, nominated one Party for each vacancy as it occurred on the Advisory Council. Advisory Council nominees were unopposed. (Id.).

The makeup of Ernst & Young's Management Committee was identical to the Ernst & Young U.S. Management Committee. (Pl. Ex. 75, Sec. 2(b)). Upon the selection of a member to the Ernst & Young U.S. Management Committee, that person automatically became a member of Ernst & Young's Management Committee.

(Id.) The Management Committee was responsible for Ernst & Young's general management. (Id., Sec. 2(a)).

III. The Parties' Investment In Ernst & Young U.S.

Both Capital Account Parties, such as Simpson, and Investment Account Parties were required to contribute funds into a Capital Account or an Investment Account, respectively. The Management Committee determined the amount each Party was required to contribute. (Pl. Ex. 46, Sec. 6(a)). Simpson appears to have contributed $84,000 to his Capital Account. (Df. Ex. 527). The Parties "capital contributions" were accomplished without any out-of-pocket expense to them. Ernst & Young U.S. arranged with Citibank to borrow the capital contribution funds on the Parties' behalf. (Pl. Ex. 69, p. 55). The firm did not guarantee these loans. (Doc. 147, p. 449). It did, however, pay the periodic interest due from the Parties to Citibank and debited the parties' accounts accordingly. (Id., p. 450). In addition, the Parties earned interest on their "capital contributions," which Ernst & Young U.S. paid to them.[1] The Parties were required to reduce the balance of their Accounts ten percent per year beginning the third year after the merger. (Id., p. 443).

Regarding Ernst & Young, the Partnership Agreement states that "At [sic] October 1, 1989, the amount of the Capital Account of each Partner shall be established by the Management Committee." (Pl. Ex. 75, Sec. 4(a)). Simpson did not establish a capital account for this entity.

Upon dissolution of Ernst & Young U.S., the Management Committee will determine the amount owing to former Parties and current Parties. (Pl. Ex. 46, Sec. 18). Upon dissolution of Ernst & Young, the Management Committee, in its discretion, will

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[1] Prior to the merger, Parties were to be paid interest on the Capital and Investment Accounts at approximately the prime rate. (Pl. Ex. 69, p. 54). Pursuant to the U.S. Agreement, the Parties received a "special earnings allowance" from Ernst & Young U.S., based on its use of the Capital and Investment Account funds at such rate as the Management Committee established. (Pl. Ex. 46, Sec. 9). The firm treated this allowance as a payment of interest. (Doc. 147, pp. 504-05).

allocate to the Partners the liquidation proceeds. (Pl. Ex. 75, Sec. 9).

As a Capital Account Party, Simpson was stated to be jointly and individually liable for the losses of Ernst & Young U.S. (Pl. Ex. 46, Sec. 19); as a Partner, he was stated to be jointly and individually liable for Ernst & Young losses. (Pl. Ex. 75, Sec. 10).

IV. Simpson's Earnings

Ernst & Young U.S. paid Simpson an annual salary in an amount the Management Committee determined, which was charged as a business expense. (Pl. Ex. 46, Sec. 8(b)). For state tax purposes, Ernst & Young U.S. treated Simpson's salary as just that—a salary. (Doc. 147, p. 449). For federal tax purposes, however, Ernst & Young U.S. reported his salary on a Schedule K-1 as a distribution of partnership earnings. For the 1990 tax year, Simpson represented in his federal tax return that Ernst & Young U.S. was a partnership and that he was a partner.

The Partnership Agreement did not reference a payment of salary; it stated that Ernst & Young's profits and losses, if any, were allocated as the Management Committee in its sole discretion determined. (Pl. Ex. 75, Sec. 4(b)). Simpson, however, received no compensation from Ernst & Young.

In addition to a salary, Ernst & Young U.S.'s Management Committee determined the amount of an "allocation" payable to each Party. (Pl. Ex. 46, Sec. 8(b)). This allocation was based on performance, level of responsibility, years of service, and other factors. (Pl. Ex. 69, p. 54).

V. Simpson's Rights

As an Ernst & Young U.S. Party, Simpson had the right to vote on proposed major firm combinations in the manner determined by the Management Committee (Pl. Ex. 46, Sec. 17). He had the right to vote on amendments to the U.S. Agreement (Id., Sec. 22). He also had the right to vote on the dissolution of Ernst & Young U.S. (Id., Sec. 18). The Advisory Council, however, was responsible for approval of any matter submitted to the Parties for vote. (Id., Sec. 5(c)(v)). As an Ernst & Young Partner, Simpson had the right to vote for the dissolution of Ernst

& Young. (Pl. Ex. 75, Sec. 9). He also had the right to vote on any amendment to the Partnership Agreement. (Id., Sec. 13).

Simpson did not have the right to vote for members of the merged firms' Management Committees, see supra, pp. 650-51; however, the Management Committee nominees were made known to Simpson and other members of Arthur Young and Ernst & Whinney prior to the merger. (Pl. Ex. 69, p. 27; Pl. Ex. 73, p. 6).

Arthur Young partners had the right to an accumulated UBT, which was to be paid to them over an eight year period following withdrawal or retirement from that firm. UBT was an acronym for unbilled time and uncollected fees. (Pl. Ex. 69, p. 56). As a former partner of Arthur Young, Simpson retained ownership of his Arthur Young UBT account after the merger. Neither Ernst & Young nor Ernst & Young U.S. gave Simpson any UBT rights.

Simpson did not have the right to examine the books, records, or accounts of Ernst & Young U.S. or Ernst & Young, except to the extent that the Chairman or Management Committee might permit. (Pl. Ex. 46, Sec. 20(e); Pl. Ex. 75, Sec. 7(d)). He was also required to maintain a will providing that his heirs and personal representatives would accept as correct the entities' accounts without examination or verification of the books and records. (Id.).

Simpson had no right of access to legal opinions issued by Ernst & Young's general counsel; general counsel did not consider Simpson to be his client. Ernst & Young claimed attorney-client privilege to prevent Simpson from obtaining a relevant legal memorandum written by its general counsel to the Management Committee prior to Simpson's termination from Ernst & Young. (Doc. 46).

Simpson was unable to sign promissory notes binding the respective entities. (Pl. Ex. 46, Sec. 20(a)(i); Pl. Ex. 75, Sec. 7(a)). He could not assign, pledge, or otherwise transfer his interest in either entity. (Pl. Ex. 46, Sec. 20(b); Pl. Ex. 75, Sec. 7(b)). He could not become a director or executive of any corporation other than non-profit or charitable organizations without the consent of the Chairman. (Pl. Ex. 46, Sec. 20(a)(ii)). He also

could not make any loan or advance any of his funds to another Party or employee of Ernst & Young U.S. (Id., Sec. 20(a)(iii)).

As an Ernst & Young U.S. Party, Simpson was required to have his performance reviewed annually by his supervisor. He was not entitled to know other Ernst & Young U.S. Parties' compensation.

The U.S. Agreement contains a detailed section entitled "Retired Parties," which addresses, among other items, payments to Retired Parties. (Pl. Ex. 46, Sec. 12). The U.S. Agreement also contains a detailed section entitled "Disability." (Id., Sec. 13). The Partnership Agreement does not address these issues.

Following the merger, Simpson lost his position as Managing Partner in charge of the Cincinnati office and was named Director of Entrepreneurial Services for that office, a lesser position. Simpson did not have authority to operate Entrepreneurial Services according to his own discretion. He was obligated to implement a national strategic plan under the authority of the Cincinnati Office's Managing Partner. He could not transfer, hire, or fire Entrepreneurial Services personnel. Simpson was also involved in the development of a marketing plan for the Cincinnati office. He had no authority to sign the firm's name to an audit. Nor did he have authority to accept new clients for the firm.

VI. Simpson's Discharge

At the time of the merger, an analysis of the merged firms' retirement benefit plans showed that the accumulated benefit obligations were $290,000,000 higher than the funding then available. (Doc. 144, pp. 279-80, 285). Despite representations that the merger was not expected to result in a reduction in "partners" (Id., p. 289), the Management Committee had concluded that a substantial number of "partners" would have to be discharged. An October 5, 1989 memorandum from Ernst & Young's first Management Committee meeting indicated "excess professional staff capacity to be about 8%" and stated that the "Plan is to act on 5% excess by November 15 ..." (Pl. Ex. 30). The agenda for the December 18, 1989 Management Committee meeting included items entitled "Partner movement and retention" and "1990 Partner Admissions." (Pl. Ex. 31). "Partner

movement" meant discharging partners as well as partner retirement. (Doc. 144, p. 250).

The December 18, 1989 Management Committee agenda included a list of former Arthur Young partners by age, showing the total number of years with Arthur Young, the total number of years as a "partner," and any break in service. (Pl. Ex. 35). These are items considered in determining whether a Party has worked the years necessary to vest in a retirement plan. (Doc. 144, pp. 263-64). The February 21, 1990 Management Committee agenda addressed "Partner resignations and retirements" as well as the "1990 Partner recommendation process." (Pl. Ex. 37). Regarding the former, the agenda included a table entitled "Comparison of Partner Ages in Fiscal 1990," which grouped partners by age. (Id.). Ernst & Young Management Committee member Jesse Miles stated that the firm engaged in a "process of resignations and retirements" to reduce the number of "partners" ... "in order to protect the firm from substantial reduction in profits." (Doc. 144, p. 266). He characterized the process as a "lay off." (Id., p. 291).

When asked whether the Management Committee considered a freeze on the admission of new partners or a reduction in the earnings of present partners as an alternative to discharging current partners, Miles testified that would have been "a dumb move." (Id., p. 261). He stated the firm did not want to lose its recently hired accountants or its ability to attract accountants. "And you encourage bright, capable young people to join the firm with the objective of success. And success is called partnership in a major accounting firm. And in order to keep those people attracted, making adequate income and wanting to stay with the firm, they have to be able to know that they stand a chance of becoming partners." (Id., p. 262).

The Management Committee had the right to request Simpson to terminate his relationship with Ernst & Young U.S. by giving him six months written notice. (Pl. Ex. 46, Sec. 11(a)). Simpson had no right to appeal his discharge or the discharge of any other Party. Upon discharge, the Management Committee determined the net amount owing to a Party. That determination was final and binding. (Id., Sec. 11(b)).

During the period October 1, 1989 through March 25, 1991, Ernst & Young U.S. discharged approximately 127 Parties while hiring approximately 122 new accountants. (Pl. Ex. 109). In May 1990, Ernst & Young U.S. requested Simpson's resignation. He refused, and on June 19, 1990, he was given written notification that he was discharged effective December 19, 1990. He was then 46 years old.

The amount due Simpson upon discharge was calculated in December 1990, nine months prior to the end of Ernst & Young's fiscal year. (Doc. 147, p. 508).

OPINION

I. The Court Should Apply Traditional Partnership Law Concepts In Determining Whether Simpson Was A Partner Or An Employee

Pursuant to 29 U.S.C. § 623(a)(1), it is "unlawful for an employer ... to discharge any individual ... because of such individual's age." The Act defines an employee as "an individual employed by any employer." 29 U.S.C. § 630(f). An employer is defined as "a person engaged in an industry affecting commerce who has twenty or more employees ..." 29 U.S.C. § 630(b). Title VII of the Civil Rights Act of 1964, which prohibits discrimination against employees because of race, color, religion, sex or national origin, provides no further guidance on the definition of "employee." 42 U.S.C. § 2000e *et seq.*[2] These definitions are circular and explain nothing. *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992). Nevertheless, it is clear that ADEA, Title VII, and AWDA serve to protect "the enormously important right to equal employment," *LeMasters v. Christ Hospital*, 777 F. Supp. 1378, 1379 (S.D. Ohio 1991) (Spiegel, J.), and to eradicate from the workplace the evil of

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[2] ADEA was enacted to fill the gap left by Title VII, which did not address age discrimination. The prohibitory language in ADEA is strikingly similar to that of Title VII and many courts have relied on Title VII precedent to interpret ADEA. *See e.g., EEOC v. Elrod*, 674 F.2d 601 (7th Cir. 1982). The Americans With Disabilities Act (AWDA) similarly prohibits discrimination against disabled individuals. 42 U.S.C. § 12101 *et seq.*

discrimination on account of an individual's age, race, color, religion, sex, national origin, or handicap. *See Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983).

Ernst & Young asserts that neither Simpson nor any other Party discharged during 1990 and 1991 is entitled to the protection afforded by the employment discrimination laws because these individuals are not employees, but partners. The inescapable logic of this position is that Ernst & Young claims to be free to discriminate against hundreds of its accountants due to age, race, sex, religion, national origin, and handicap because it asserts they are not employees.

Simpson, who considered himself to be a partner during his employment with Ernst & Young, now contends that he was actually an employee, as that term is defined in the law, and did not meet the legal definition of partner. He seeks the protection of the age discrimination laws. Relying on *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961), and *Armbruster*, 711 F.2d at 1339-40, Simpson contends that the Court should use an "economic reality" test rather than traditional legal concepts in determining whether he was a partner or employee. The Sixth Circuit has described this test as "a loose formulation, leaving the determination of employment status to case-by-case resolution based on the totality of the circumstances." *Lilley v. BTM Corporation*, 958 F.2d 746, 750 (6th Cir.), *cert. denied*, 113 S. Ct. 376 (1992).

Ernst & Young contends that an economic reality test is not the appropriate means to determine whether an individual is a partner or employee and that Simpson's status must be determined by the application of traditional partnership law concepts. Ernst & Young claims Simpson possessed both "essential and non-essential" attributes of a partner. It argues that whatever partnership characteristics Simpson lacked, he voluntarily delegated them to the Management Committee and their absence did not destroy his

partner status.[3] Therefore, it claims, the Court has no jurisdiction over his age discrimination claims.

The Supreme Court developed the economic reality test in a Fair Labor Standards Act (FLSA) case. *See Goldberg*, 366 U.S. 28. In so doing, it relied on FLSA's provision that the term "employ" includes "to suffer or permit to work," 29 U.S.C. § 203(g), a definition not found in ADEA, Title VII, or AWDA. The Sixth Circuit has applied the economic reality test to determine whether an individual was an employee rather than an independent contractor under the employment discrimination laws, *see Lilley*, 958 F.2d 746; *Armbruster*, 711 F.2d 1332, but has not yet addressed the partner vs. employee question. Nor has the Supreme Court addressed the issue.

In *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344 (1992), decided after the aforementioned cases, the Supreme Court unanimously ruled that traditional agency law criteria should be used to determine whether the plaintiff was an independent contractor or an employee under ERISA. In so ruling, the Court rejected its reasoning in previous cases decided under the National Labor Relations Act, *NLRB v. Hearst*, 322 U.S. 111, 124 (1944), and Social Security Act, *United States v. Silk*, 331 U.S. 704, 713 (1947), which, applying the economic reality test, held "employee" was construed more broadly than the common law definition. *Darden*, 112 S. Ct. at 1349. The Court noted that Congress amended the National Labor Relations Act to effectively nullify the Hearst decision and require the application of traditional agency principles in distinguishing employees from independent contractors. Id. As a result, in 1989, the Supreme Court abandoned its emphasis on construing "employee" in light of the mischief to be corrected and the end to be attained by the statute in question in favor of a traditional legal definition. Id., *citing*

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[3] This Court has previously rejected Ernst & Young's contention that Simpson's use of the term "partner" in his complaint constitutes a judicial admission of his employment status. (Doc. 101, pp. 9-10). The Court also found that Simpson's vote in favor of the merger and his signing the Partnership Agreement and U.S. Agreement have no significance in the determination of his employment status. (Id., p. 10).

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

The Court distinguished the economic reality test applied in FLSA cases, *see Goldberg*, 366 U.S. 28; *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), because unlike ERISA, FLSA contained an "expansive" definition of the verb employ to mean "suffer or permit to work." *Darden*, 112 S. Ct. at 1350. The Court further rejected the use of a test based upon the claimant's expectations as begging the question whether he held employee status, because such an approach would "compromise the capacity of companies ... to figure out who their 'employees' are and what ... their pension fund obligations will be." Id.

Because ADEA, Title VII, and AWDA also lack FLSA's "expansive" definition of the verb "employ," Darden indicates that the Sixth Circuit's use of the economic reality test in employment discrimination cases may be in error. Although neither the Supreme Court nor the Sixth Circuit has addressed the proper test to be used to distinguish partners from employees, Darden strongly counsels the use of traditional legal principles to determine this issue rather than a broader test.

Under *Darden's* traditional agency law principles test, numerous factors regarding the employment relationship are considered, and no one factor is decisive. 112 S. Ct. at 1349. The Supreme Court approved the following factors in an analysis of whether Darden was an independent contractor or employee: 1) the hiring party's right to control the manner and means by which the product is accomplished; 2) the skill required by the hired party; 3) the source of instrumentalities and tools; 4) the location of the work; 5) the duration of the relationship between the parties; 6) the hiring party's right to assign additional projects; 7) the hired party's discretion over when and how long to work; 8) the method of payment; 9) the hired party's role in hiring and paying assistants; 10) whether the work is part of the hiring party's regular business; 11) whether the hiring party is in business; 12) the hired party's employee benefits; and 13) tax treatment of the hired party's compensation. *Darden*, 112 S. Ct. at 1348. The application of these factors to this case would result in a finding that Simpson was an employee. The agency test, however, is more relevant to the independent contractor vs. employee issue than to the partner vs.

employee issue, because Simpson was an agent of Ernst & Young, whether he was a partner or an employee.[4]

What is pertinent about *Darden's* agency law test is the Court's comparison of the independent contractor characteristics the claimant possessed to his employee characteristics when deciding whether he was an independent contractor or an employee. No one factor is controlling. The *Darden* rationale also rejects the premise that if the claimant possessed any characteristics of an independent contractor, he could not be considered an employee under the traditional agency law test. [illegible]st & Young has cited, and we have found, no case standing fo[illegible] proposition that if a claimant possesses any characteristics [illegible] partner, this precludes him/her from being an employee.

Although the traditional agency law test is not applicable to the partner vs. employee cases, one common thread exists between the latter cases and the independent contractor vs. employee cases: bona fide independent contractors and partners are employers, not employees. As an employer, an individual is not entitled to ADEA or ERISA coverage.

We do not view the *Darden* analysis as a quantitative test where the Court simply adds up employee and employer attributes a claimant possessed. Rather, it must be a qualitative test to determine whether the claimant actually met the traditional legal definition. In order to determine whether Simpson was a bona fide partner, we must examine the traditional legal concepts of partnership.

II. Traditional Partnership Law Concepts

The parties agree that New York law applies to the Ernst & Young organization. Both the Partnership Agreement and the U.S. Agreement state that their construction is in accordance with the laws of the State of New York. (Pl. Ex. 75, Sec. 12; Pl. Ex. 46, Sec. 21). In New York, traditional partnership concepts are codified in N.Y. PARTNERSHIP LAW § 1 *et seq.* (McKinney 1988) and are set forth in the state's case law.

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[4] A partner is an agent of the partnership. N.Y. PARTNERSHIP LAW § 20 (McKinney 1988).

A partnership is an "association of two or more persons to carry on as co-owners a business for profit." N.Y. PARTNERSHIP LAW § 10 (McKinney 1988). Thus, a bona fide partner is one who owns the business, i.e., an employer.

While sharing the firm's gross receipts does not establish a partnership, id., § 11(3), sharing the firm's net profits may be prima facie evidence that one is a partner. Id., § 11(4). No such inference may be drawn, however, if the share of profits was received in payment of a debt, as employee wages, or as loan interest even though the amount of payment varied with the profits of the business. Id.

Partners are jointly liable for all partnership debts and obligations. Id., § 26. A partner contributes toward the partnership losses according to his proportionate share in the profits. Id., § 40(1).

A partner is repaid his capital contribution and shares equally in the partnership's profit after all liabilities are satisfied. Id.

A partner receives interest on his/her capital contribution only from the date when repayment should be made. Id., § 40(4).

The partnership must indemnify a partner. Id., § 40(2).

All partners have equal rights in the management and conduct of partnership business. Id., § 40(5).

No person may become a member of a partnership without the consent of all partners. Id., § 40(7).

While any difference arising as to ordinary matters connected with the partnership may be decided by a majority of the partners, no act in contravention of the agreement between the partners may be done without the consent of all partners. Id., § 40(8).

Subject to any agreement between the partners, the partnership books are kept at the principal place of the partnership's business. Id., § 41. Every partner must have access to and may inspect and copy any of the partnership records. Id. A partner has a duty to render, on demand, all information affecting the partnership. Id., § 42.

Partners owe a fiduciary duty to one another. Id., § 43. The nature of the fiduciary duty is such that each partner owes to the

others the highest degree of fidelity, loyalty, and fairness in their mutual dealings. *Application of Lester*, 87 Misc.2d 717, 386 N.Y.S.2d 509 (Sup. Ct. 1976). Because of this fiduciary duty, in their dealings with one another partners cannot fall back on morals of the marketplace. *Auld v. Esteridge*, 86 Misc.2d 895, 382 N.Y.S.2d 897 (Sup. Ct. 1976), *aff'd*, 58 A.D.2d 636, 395 N.Y.S.2d 969 (App. Div.), *appeal denied*, 43 N.Y.2d 641, 371 N.E.2d 830 (1977).

The property rights of a partner are: 1) his rights in specific partnership property; 2) his interest in the partnership; and 3) his right to participate in the management of the partnership. Id., § 50. As to specific partnership property, a partner is co-owner with his partners as a tenant in partnership. Id., § 51. A partner's interest in the partnership is his share of the profits and surplus. Id., § 52.

While N.Y. PARTNERSHIP LAW § 40 implies that certain partnership rights may be delegated by agreement, the following rights set forth in other sections are not delegable:

The right to access, inspection, and copying of partnership books, id., § 41;

The duty of partners to render to another partner on demand true and full information of all things relating to the partnership, id., § 42;

The fiduciary duty one partner owes another, id., § 43; The right to participate in the management of the partnership, id., § 50, even though a partner may delegate his equal share of management and operations, id., § 40(5);

The right of a partner to be a co-owner of partnership property, § 51; and

The right to share the profits and surplus, id., § 52.

The Uniform Partnership Act (UPA) has been adopted by most states, including New York in 1919, as the governing body of partnership law. It sets forth, among others, the following characteristics of a partner: unlimited liability (§ 15); the right to share in profits and participate in management (§ 18(a), (e)); the right and duty to act as an agent of the other partners (§ 9); shared ownership (§ 6); and fiduciary relationship among partners (§ 21).

The drafters of the UPA used the term "co-owners" to indicate that each partner has "the power of ultimate control." UNIF. PARTNERSHIP ACT § 6 official cmt., U.L.A. (1969).

The concurring opinion in *Hishon v. King & Spaulding*, 467 U.S. 69 (1984), also provides some guidance as to the nature of partnership. There, Justice Powell reasoned that the relationship among partners should not be characterized as an employment relationship to which Title VII may apply:

> The relationship among law partners differs markedly from that between employer and employee . . . . The essence of the law partnership is the common conduct of a shared enterprise. The relationship among law partners contemplates that decisions important to the partnership normally *will be made by common agreement . . . or consent among the partners*.

Id. at 79-80, 104 S. Ct. at 2236 (emphasis added). Critical to this concept of a professional partnership is the partners' authority to make decisions important to the partnership. The mere labeling of an individual as a partner does not make him so. *Id.* at 80, n. 2, 104 S. Ct. at 2236, n. 2. *See also EEOC v. Peat, Marwick, Mitchell & Co.*, 589 F. Supp. 534, 539 (E.D. Mo. 1984), *aff'd*, 775 F.2d 928 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986).

Ernst & Young cites the following cases in support of its contention that the protections of ADEA do not extend to members of professional organizations, such as Simpson. Most of these cases provide little guidance.

In *Burke v. Friedman*, 556 F.2d 867, 869 (7th Cir. 1977), a Title VII action brought against an accounting firm, the Seventh Circuit, with little analysis, concluded that "we do not see how partners can be regarded as employees rather than as employers who own and manage the business." The Seventh Circuit neither questioned the plaintiff's status as a partner nor did it set forth any facts relative to the plaintiff's relationship with her accounting firm.

In *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984), a Title VII action brought against a law firm, the Seventh Circuit extended its holding in *Burke* to encompass shareholders in a professional corporation based on the rationale that the "management, control, and ownership" of a professional

corporation is much like the "management, control, and ownership" of a partnership. Id. at 1178. As in *Burke*, the Seventh Circuit in *Dowd & Dowd* did not question the plaintiff's status as an owner/shareholder nor did it discuss what management, control, or ownership rights the plaintiff possessed.

Hyland v. New Haven Radiology Associates, P.C., 794 F.2d 793 (2nd Cir. 1986), also offers no guidance as to what characteristics an employer should possess. In that case, the Second Circuit concluded that, since the plaintiff-physician was a member of a professional corporation, he must be an employee and covered by ADEA. Id. at 798. The Second Circuit found any inquiry into the plaintiff's partnership status to be irrelevant. Id.

On the other hand, *Wheeler v. Hurdman*, 825 F.2d 257, *cert. denied*, 484 U.S. 986 (1987), relied upon by Ernst & Young, is instructive. Wheeler brought an action against her accounting firm claiming age and sex discrimination. Although Wheeler conceded her status as a partner, she contended that she was also an employee under ADEA and Title VII. The Tenth Circuit reversed the district court's application of the economic reality test and instead relied upon the Uniform Partnership Act. It recognized that an individual cannot be both a *bona fide partner* and an employee under ADEA or Title VII. Id. at 277 (emphasis added). After delineating the attributes of a bona fide partner, the Court concluded that the "total bundle of partnership characteristics" differentiated partners from employees. Id. at 276.

The Court listed factors which distinguished Wheeler's partnership from her prior position as an employee with the firm: 1) participation in profits and losses; 2) exposure to liability; 3) investment in the firm; 4) partial ownership of firm assets; 5) voting rights; 6) position under the partnership agreement; and 7) position under partnership laws. Id. Wheeler possessed the following partnership attributes: she had signed a partnership agreement; her compensation was not a salary but a share of the firm's profits paid by draw and an allocation of profits based on points; she made a genuine capital contribution; she had unlimited personal liability for partnership debts; she had the right to vote on dissolution, large mergers, admission of new partners, partner termination, shares of net profits, special distributions, and any

other allocation of income; she could sign audits and tax returns; and she was reimbursed for certain club dues. Id. at 260.

Implicit in the Tenth Circuit's decision is the concept that, had Wheeler possessed something less than the "total bundle of partnership characteristics," she would not have been considered a bona fide partner, even though the firm so denominated her. *Wheeler* possessed more characteristics of a partner than did Simpson. *See* detailed discussion *infra*, pp. 21-30. Aside from the cases Ernst & Young cited, the following cases are also pertinent.

In *Fountain*, 925 F.2d 1398, the issue was whether the plaintiff was a partner or an employee of his accounting firm under ADEA. The Eleventh Circuit held:

> [W]e look to the particular circumstances of the case at hand, (citation omitted) and, in so doing, we focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership.

Id. at 1400-01. Looking beyond corporate nomenclature, the Court found Fountain, one of four shareholders in a professional corporation, to be a partner based on the following facts: 1) he was compensated on the basis of a share of the firm's profits; 2) he was liable for certain debts of the firm; and 3) he had the right to vote proportionate to his ownership share on amendments to the agreement, admission of new partners, termination of partners, and distribution of profits and income. Id. at 1401. Fountain possessed more characteristics of a partner than Simpson.

In *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F. Supp. 144 (S.D.N.Y. 1987), the issue was whether the plaintiff was a partner or an employee of his accounting firm under ADEA. The District Court rejected a per se rule exempting individuals termed partners from ADEA protection, because such a rule would allow employers to strip employees of their ADEA rights simply by calling employees partners without giving them any decision-making authority or job security. Id. at 148. The Court also reasoned that the adoption of such a rule would prevent invocation of ADEA by physicians, accountants, attorneys, and other professionals who have traditionally organized their

businesses as partnerships. The Court held there is nothing in the legislative history of ADEA or other anti-discrimination statutes which suggests that these statutes should not apply to such professionals, noting that the Senate rejected an amendment to Title VII which would have exempted physicians. *Id.*, *citing EEOC v. Rinella & Rinella*, 401 F. Supp. 175, 180-81 (N.D. Ill. 1975).

The *Caruso* Court focused on three traditional partnership law factors: 1) the extent of the claimant's ability to control and operate his business; 2) the extent to which the claimant's compensation was calculated as a percentage of the firm's profits; and 3) the extent of the claimant's employment security. 664 F. Supp. at 149-50. The Court denied the defendant's motion to dismiss and motion for summary judgment based on the following facts: Caruso did not hold a management position; he could make few discretionary decisions on behalf of his clients without management approval; he was required to submit time sheets; he received a set period of vacation time every year; he was subject to formal job evaluation; he could make no personnel decisions on his own initiative; he held no ownership interest in the firm; he received a base salary plus additional compensation based upon a number of assigned units (he held 350 units on a scale of 175 to 3300); his voting power was determined by the number of his units; and, although he had the power to block a partnership appointment, he had no right to question management's decision to discharge a partner. Id. at 145-46, 149-50; and 717 F.Supp. 219-20, 222-23 (S.D.N.Y. 1989). He was ultimately found to be an employee following a jury trial. *Caruso*, 779 F. Supp. 332, 333 (S.D.N.Y. 1991). Caruso's job attributes were similar to Simpson's; however, Caruso had more partnership characteristics than Simpson. Simpson did not receive compensation based on a pro rata share, nor did he have the power to block a partnership appointment. *See* detailed discussion *infra*, pp. 21-30.

Although *Wheeler*, *Fountain*, and *Caruso* were decided prior to *Darden*, they do not conflict with its rationale. In each case, the court reviewed traditional partnership law factors which differentiate partners from employees. Ernst & Young argues that only the "essential" elements of partner status should be considered, which it identifies as sharing profits and unlimited personal liability. It deems other partnership indicia, such as

capital contribution, ownership interest, and meaningful participation in partnership decisions to be non-essential. Traditional partnership law concepts do not support this selective categorization of partnership indicia. All factors should be considered, with no one factor being decisive. *See Darden*, 112 S. Ct. at 1349; *Wheeler*, 825 F.2d at 276.

We now turn to examine the partner vs. employee characteristics Simpson possessed.

III. Simpson Was An Employee Subject To ADEA Protection

A. Simpson Did Not Make A True Capital Contribution To The Firm

Simpson never established a capital account with Ernst & Young. Therefore, we give no weight to the Partnership Agreement's reference to a Capital Account.

Simpson established an Ernst & Young U.S. Capital Account. Simpson's "capital" payment into this account was arranged by Ernst & Young and financed by Citibank. This "capital contribution" generated interest payments from Ernst & Young U.S. rather than a pro rata share of the profits. The Capital Account was not the basis for a Party's pro rata share of either profits or firm assets. (Doc. 147, p. 512). Thus, Simpson's payment to Ernst & Young U.S. was more akin to a loan than a capital contribution.

Gary Stewart, a CPA and expert in the field of CPA business organizations, testified at trial that Simpson did not contribute capital but rather loaned money to Ernst & Young U.S. (Doc. 146, pp. 367-68). Stewart's opinion was based on several factors: 1) the definition of "firm capital" in Section 7 of the U.S. Agreement indicates that "amounts owing to Parties" are treated as a firm liability rather than as owner's equity (id., p. 365); 2) when a Party withdraws from the firm, he receives only what he paid in plus interest, rather than a percentage of the value of the firm (id., p. 366); and 3) the firm paid interest to the Parties on their Capital Accounts. (Id.)

We view Simpson's Capital Account as a paper transaction designed to give him the appearance, but not the reality, of a partner. On its face, his substantial payment ($84,000) appears to

be a capital contribution to the firm. However, Simpson did not invest one cent of his own money in the firm. The firm arranged the bank loan that Simpson signed and paid the interest on his behalf. He made no payments on the principal. Although the U.S. Agreement bound him to begin reducing the principle in his third year with Ernst & Young U.S., he was discharged before then. Although he was liable to the bank for the principal, his Capital Account at the firm was available to, and ultimately did, satisfy the debt. His yearly earnings and discharge payment were not based on the proportion $84,000 contribution had to total capital investment in the firm. It appears that the primary significance of his Capital Account was not to establish Simpson's ownership interest, but to generate funds for the firm. As of the date of Simpson's termination, he had not made a true capital contribution to the firm.

B. Simpson Did Not Share In The Firm's Profits and Losses

Simpson received no compensation from Ernst & Young. Therefore, we give no weight to the reference in the Partnership Agreement that its profits be allocated among its Partners.

Simpson received an annual salary from Ernst & Young U.S., as determined by the Management Committee. The U.S. Agreement does not identify Simpson as a partner and specifically refers to his compensation as "salary." For state tax purposes, Ernst & Young U.S. treated Simpson's compensation as salary. For federal tax purposes, however, it treated it as a partnership distribution of earnings. This is of little significance, because under Internal Revenue Code regulations, a partnership is considered to be anything which is not a corporation, trust, or estate. 26 C.F.R. § 301.7701-3(a). Simpson's salary did not vary based on the rise and fall of firm profits. There was no evidence that Simpson or any other Party were required to return any amount of salary due to declining profits. Nor was there evidence that his salary was calculated as a proportionate share of the firm's profits.

In addition to his salary from Ernst & Young U.S., Simpson was eligible to receive an "allocation" each year, also determined by the Management Committee. Neither party discussed in their

memoranda the relative amounts of Simpson's salary compared to his allocation or its significance. Pursuant to the U.S. Agreement, a Party could receive advances against his/her allocation, but would have to return any advances in the event that they exceeded the allocation. The separate denominations and treatment of salary and allocation indicate that the two items are different. There is no evidence, however, that allocations were calculated from net profits or even from gross receipts. Nor is there evidence that Simpson's allocation was calculated as a proportionate share. (Pl. Ex. 46, Section 8(a), (b)). The U.S. Agreement fails to set forth any formula for calculating allocations, leaving the determination instead to the Management Committee. Id. Since Simpson had no right to an accounting as to how his allocation was calculated, he did not have the ability to offer evidence on this issue. It is fair to infer that, had Simpson's allocation been calculated from his proportionate share of net profits, Ernst & Young would have introduced that favorable evidence. Therefore, we conclude the allocation was comparable to a periodic bonus paid to an employee at the firm's discretion from the firm's gross revenues. *See Caruso*, 664 F. Supp. at 150.

In contrast to Simpson, the plaintiff in *Wheeler*, found to be a partner, received a share of the firm's profits and an allocation of profits based on points. *Wheeler*, 825 F.2d at 260. The plaintiff in *Fountain*, found to be a partner, shared in the firm's profits, losses, and expenses and was compensated on the basis of a share in the firm's profits. *Fountain*, 925 F.2d at 1401.

C. Simpson Had No Other Indicia Of An Ownership Interest In The Firm

Ernst & Young contends that Simpson's ownership rights in the firm are demonstrated by his UBT account. The UBT account, however, is not indicative of his relationship with Ernst & Young since this account was a carry-over from his prior relationship with Arthur Young. Neither Ernst & Young nor Ernst & Young U.S. utilized UBT accounts. Their failure to continue a UBT arrangement demonstrates that the firms, rather than their members, owned the accounts receivable. (*See* Pl. Ex. 69, p. 56).

Ernst & Young also contends that Simpson had a contingent undivided interest in all firm assets, citing the U.S. Agreement,

Section 18. That section, however, applies only upon dissolution or liquidation of the firm. When Simpson left the firm, Ernst & Young U.S. calculated his compensation in December, nine months prior to the firm's fiscal year end, using an estimate based on the prior year's figures. (Doc. 147, pp. 508-09). Thus, Simpson's discharge compensation was not measured by any ownership interest in the firm's assets but was a salary. Furthermore, Section 18 states that, upon dissolution or liquidation, the amount owing to each Party shall be computed pursuant to Section 11. The latter does not provide for a distribution of an undivided interest in firm assets. Rather, it awards a Party the amount of his Account, as determined by the Management Committee; any allocations or interest the firm owes the Party; and the Party's proportionate allocation for the current fiscal year, less any liability the Party owes the firm, plus an "earnings charge" pursuant to Section 9 computed by the Management Committee. Simpson did not possess an undivided interest in firm assets.

Ernst & Young claims that Simpson's ownership interest in the firm is shown by his rights regarding the firm's operations. It points to the fact that Simpson could vote for amendments to the Partnership Agreement and the U.S. Agreement, dissolution of the firm, certain mergers, and members of the Advisory Council. Simpson's voting rights, however, were illusory because the Advisory Council had the right to approve and thus, implicitly, to veto any vote put to the Parties. Simpson's right to vote for members of the Advisory Council was perfunctory since the candidates were unopposed and selected by the Nominating Committee which, in turn, was selected by the Management Committee. Furthermore, the Advisory Council had no direct authority to act, serving only in an advisory capacity to the Management Committee. The Chairman selected the members of the Management Committee without any vote of the Parties, and the Management Committee selected the Chairman. The Chairman and the Management Committee managed the firm. Thus, as a practical matter, the Parties had no power to alter decisions of the Chairman and the Management Committee.

Even more illuminating are the issues for which Simpson had no vote. He had no vote for Management Committee membership. He had no vote for the admission of new partners. He had no vote

on the discharge of existing partners, including himself. Finally, he had no vote on how firm members were to be compensated.

In contrast, the plaintiffs in *Wheeler* and *Fountain*, who were found to be partners, had specific voting rights regarding the admission and termination of partners and the distribution of profits. *Wheeler*, 825 F.2d at 260; *Fountain*, 925 F.2d at 1401. *See also Maher v. Price Waterhouse*, No. 84-1522 C(2), 1985 WL 9500 (E.D. Mo. April 8, 1985). Even the plaintiff in *Caruso*, who was ultimately found to be an employee, had more voting rights than Simpson, as he had the power to block a partnership appointment. *Caruso*, 664 F. Supp. at 146.

D. Simpson Had No Right To Examine The Firm's Books And Records

Simpson did not have the unconditional right to examine the firm's books and records, and he was denied access to them regarding the UBT accounts. He had no right to learn the other Parties' compensation. A basic tenant of a bona fide partnership is that every partner shall at all times have access to and may inspect and copy partnership books. N.Y. PARTNERSHIP ACT, § 41 (McKinney 1988); *Romeo v. Russo*, 31 A.D.2d 935, 299 N.Y.S.2d 7 (App. Div. 1969). Although some other emoluments of partnership are, under the New York Partnership Act, implicitly delegable, this section is not subject to variation by agreement of the parties. *Newburger, Loeb & Co., Inc. v. Gross*, 365 F. Supp. 1364, 1369 (S.D.N.Y. 1973).

E. Simpson Had Little, If Any, Management Authority

Contrary to Ernst & Young's conclusory contentions, Simpson had few rights regarding Ernst & Young U.S.'s operations. He did not have the authority to hire, fire, or transfer even clerical workers within or without his department. The operations strategy of his department was determined by a superior. Simpson was subject to annual performance reviews. To the extent involvement in a firm's operations is indicative of being a bona fide partner, the evidence shows that Simpson's partnership interest in Ernst & Young U.S. was slim, at best. *Compare Fountain*, 925 F.2d at 1399 with *Caruso*, 664 F. Supp. at 146, 150. *See also Hishon*, 467 U.S. at 79-80 (concurring opinion).

a vote of the parties, without cause, and without a right to appeal the decision. He had no equity interest in the firm. His "capital contribution" consisted of a paper transaction characterized on the books as a loan for which he received interest from the firm. His loan to the firm entitled him to no ownership interest in firm assets or accounts receivable, and Simpson and other parties possessed no points or units of ownership. He was denied access to the books and records of the firm; the firm even asserted a claim of attorney-client privilege against him. Finally, the firm disclaimed a fiduciary duty toward Simpson, and instead asserted a right to terminate him in order to make room for the "bright young people" and in order to protect compensation levels for those remaining. *See,* Appendix A at 5a-7a; Appendix C at 48a-53a. Based upon this stipulated evidence, the Sixth Circuit Court of Appeals committed no error in determining that Simpson was not a *bona fide* general partner of Ernst & Young.

Similarly, Ernst & Young's contention that parties can reach any agreement they wish and still meet the characteristics of a partnership disregards the specific provisions of the Uniform Partnership Act that mandate certain rights for partners. As the district court correctly observed, certain characteristics of partnership are essential, including among others the right to examine the books and records of the firm, the establishment of a fiduciary duty among partners, and the right of a co-owner to share in the proceeds of the firm. Appendix C at 42a-43a. An agreement which lacks these or other essential characteristics may establish some other type of relationship, such as an employee-employer relationship or a joint venture, but may not establish a partnership (*See*, Appendix C at 55a-56a and n.6). Ernst & Young's representation that the Uniform Partnership Act contains nothing but default provisions is false.

Ernst & Young also contends that the Sixth Circuit's delineation of factors illustrative of the common-law attributes of partnership creates an unworkable test because it contains twelve factors which "may be supplemented by 'other similar indicia of ownership'" (Petition at 27-28). This argument overlooks the holding of the Supreme Court in Darden that similarly lists twelve criteria concerning independent contractor status "among the other factors relevant to this inquiry," and cites as authority the "nonexhaustive criteria" in the Restatement 2d of Agency. Darden, 112 S. Ct. at 1348. Similarly, Judge Daughtrey's concurring opinion creates no confusion as argued by Ernst & Young. Instead, the concurrence clearly adopts and supports every aspect of the holding that Simpson lacks the common-law attributes of a partner. Judge Daughtrey merely adds an additional point questioning the wisdom of excluding from coverage persons in large mega-partnerships because any nominal ownership interest they may have in the firm provides no protection from discrimination. In light of Ernst & Young's argument that modern partnerships do not provide equality (Petition at 27), Judge Daughtrey's concurrence proves quite insightful.

F. The Petition of Ernst & Young Raises No Important Federal Question.

The issue presented by Ernst & Young not only lacks in constitutional importance, but also rises to the level of being offensive to the principles of equality embraced therein. As best summarized by the district court:

> Ernst & Young asserts that neither Simpson nor any other Party discharged during 1990 and 1991 is entitled to the protection afforded by the employment discrimination laws because these individuals are not

> employees, but partners. The inescapable logic of this position is that Ernst & Young claims to be free to discriminate against hundreds of its accountants due to age, race, sex, religion, national origin, and handicap because it asserts that they are not employees.

Appendix C at 37a. No constitutional goal is served by providing sanctuary to such a party.

The issue presented is further of no major precedential value because it is based upon a unique set of facts involving an illusory partnership which was intentionally designed to strip those labeled as partners from true ownership privileges. Ernst & Young's contention of impending chaos among partnerships across the United States therefore lacks validity. Of the 253,000 partnerships in the service industry referred to in its petition, Ernst & Young cites to none that has, for example, asserted attorney-client privilege against a co-owner. Nor has Ernst & Young identified any that instituted an intentional plan to oust older "partners" in order to make room for "bright young people," or one that denied a "partner" access to the books and records of the firm. Only those firms that choose to intentionally strip away the rights and powers of partner status need be concerned with the results in this case.

Furthermore, the facts upon which the appellate court opinion is based no longer exist. Ernst & Young, as evidenced by its petition, now operates as a limited liability partnership. This change in structure occurred shortly after plaintiff's trial in 1994. The agreements upon which this controversy is based have been superseded; even the vesting provisions for the retirement plan have been altered to comply with ERISA. Indeed, each of the Big 6 accounting

firms operates today as a limited liability partnership. The specific factual issue before this court is therefore moot and of no future precedential effect even to Ernst & Young.[5]

IV. CONCLUSION

The Sixth Circuit Court of Appeals correctly determined that plaintiff Simpson lacked the rights and privileges of a *bona fide* general partner, thereby rendering Ernst & Young liable for flagrant violation of the ADEA, ERISA and Ohio employment discrimination law. Ernst & Young's petition for certiorari should be denied.

Respectfully submitted,

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[5]Ernst & Young also required all terminated partners to execute a release in order to obtain limited severance benefits, although Simpson refused to do so.

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No. 96-1553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ERNST & YOUNG LLP,

Petitioner,

v.

P. LARUE SIMPSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR SIXTEEN LAW FIRMS IN SUPPORT OF THE PETITION

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33 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* FOR SIXTEEN LAW FIRMS IN SUPPORT OF THE PETITION

The following law firms (collectively, "*amici*"), hereby move pursuant to Supreme Court Rule 37.2, for leave to file the attached brief as *amici curiae*:

Arnold & Porter

Davis Polk & Wardwell

Dickinson, Wright, Moon, Van Dusen & Freeman

Fried, Frank, Harris, Shriver & Jacobson

Fulbright & Jaworski L.L.P.

Jones, Day, Reavis & Pogue

King & Spalding

Latham & Watkins

O'Melveny & Myers LLP

Paul, Hastings, Janofsky & Walker LLP

Seyfarth, Shaw, Fairweather & Geraldson

Shearman & Sterling

Skadden, Arps, Slate, Meagher & Flom LLP

Vorys, Sater, Seymour and Pease

Weil, Gotshal & Manges LLP

Wiley, Rein & Fielding

Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has not.

The *amici* are law partnerships with a diverse array of national and regional practices. Formed in different jurisdictions around the country, each firm has structured itself and its affairs in accordance with, and in reliance on, the law of the state in which it is organized. As a consequence, *amici* represent a broad range

of partnerships with differing approaches to management, profit-sharing, liability, and compensation.

The decision below — which appears to forge a new, general federal definition of partnership divorced from specific state partnership laws — is a matter of substantial concern for the *amici*, as it creates considerable uncertainty about partnership obligations and responsibilities under federal laws such as the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. *Amici* have relied on specific state partnership laws to create business structures that are competitive in today's legal market. By requiring partnerships to conform to general federal criteria that are different from and inconsistent with specific state partnership rules, the decision below might impel the restructuring of partnerships and impede law firms' ability to respond to changing economic conditions. It would also undermine the states' authority to create new forms of business associations like the Limited Liability Partnership, a recent innovation that several of the *amici* have already embraced.

Because of their significant experience in structuring and operating law firm partnerships across the country, *amici* bring a unique perspective to this case. The attached brief illustrates the adverse effect of the decision below on law firms and other business partnerships and focuses on issues that the principal parties may not present.

For these reasons, the Court should grant this motion for leave to file the attached brief *amici curiae* in support of the petition for certiorari.

Respectfully submitted,

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Schwidetzky, *Is It Time to Give the S Corporation a Proper Burial?*, 15 Va. Tax Rev. 591 (1996) 9

Smith, *After the Flood: How Strategic Planning Helped One Firm Weather Changing Times*, 11 Cf Counsel 4 (Feb. 3, 1992) 6, 8

INTEREST OF THE *AMICI CURIAE*[1]

Amici are sixteen law firms with a diverse array of national and regional practices.[2] Formed in different jurisdictions around the country, each firm has structured itself and its affairs in accordance with, and in reliance on, the specific law of the state in which it is organized. As a consequence, *amici* have different management and financial structures as well as different practices. What they all share, however, is a vital interest in preserving their freedom to structure legal relationships between and among their partners in mutually agreeable and economically productive ways.

The decision below threatens that freedom. In a ruling contrary to this Court's teaching, the Sixth Circuit fashioned and applied a judge-made, general federal definition of partnership that is considerably more restrictive than the state definition of partnership that it should have applied. Indeed, if allowed to stand, the new federal definition would raise questions about the validity of partnerships organized under the specific laws of every state. *Amici* therefore submit this brief in support of Ernst & Young's petition for certiorari.

INTRODUCTION AND SUMMARY

The threshold question in the case below was whether or not plaintiff LaRue Simpson was a partner in the accounting firm of Ernst & Young. *See Simpson v. Ernst & Young*, 100 F.3d 436, 439 (6th Cir. 1996). Simpson sued the firm under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, but Ernst & Young contended that as a co-owner and partner of the firm, Simpson was not an employee protected by either statute. *Simpson v. Ernst & Young*, 850 F. Supp. 648, 649-50 (S.D. Ohio 1994).

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[1] No counsel for any party had any role in authoring this brief, and no person other than the named *amici* and their counsel made any monetary contribution to its preparation and submission.

[2] *Amici* are described in the Appendix to this brief.

Since federal courts unanimously agree that the ADEA and ERISA protect only employees, and not business partners, *see Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404, 408 (9th Cir.) (ERISA), *cert. denied*, 116 S. Ct. 377 (1995); *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398, 1401 (11th Cir. 1991) (ADEA); *Wheeler v. Hurdman*, 825 F.2d 257, 274-75 (10th Cir. 1987) (ADEA, Title VII and Equal Pay Act), *cert. denied*, 484 U.S. 986 (1987); *Robertson v. Alexander Grant & Co.*, 798 F.2d 868, 870-71 (5th Cir. 1986) (ERISA), *cert. denied*, 479 U.S. 1089 (1987); *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 797 (2d Cir. 1986) (ADEA, Title VII), Simpson had to show that he was not a bona fide partner in Ernst & Young, even though he had always regarded himself as one until he was forced to resign. *See Simpson*, 850 F. Supp. at 654.

Both the district court and the court of appeals created and applied a general federal definition of partnership to determine whether the plaintiff was a bona fide partner. The district court found "guidance as to the nature of partnership" in the Uniform Partnership Act ("UPA") and federal case law, *id.* at 657, after reviewing, but ultimately rejecting, the elements of partnership established under the law of New York, the state where Ernst & Young was organized. *See, e.g.*, *id.*, at 662-63 (acknowledging that New York law permits partners to delegate all of their management power, but ruling that "at some point, delegation destroys partner status"). *Cf.* N.Y. Partnership Law § 40; *Tenney v. Insurance Co. of N. Am.*, 409 F. Supp. 746, 749 (S.D.N.Y. 1975) (under New York law, partner's complete lack of voice in partnership governance did not show lack of "partner" status). The Court of Appeals for the Sixth Circuit did not even consider New York law; it simply looked to the UPA and federal case law to derive a laundry list of partnership criteria. *Simpson*, 100 F.3d at 443-44. "[E]valuating the undisputed facts . . . against the common-law principles as codified in the UPA," the Sixth Circuit decided that Simpson was not a partner in Ernst & Young for purposes of the ADEA and ERISA. *Id.*

Whether someone is a bona fide business partner — and thus not an employee with standing to sue under federal employment

statutes like the ADEA and ERISA — is a question of federal law, but that does not "make state law irrelevant." *Burks v. Lasker*, 441 U.S. 471, 477-78 (1979). A court can interpret a federal statute either by creating general federal rules of decision or by employing existing state law, and the presumption is that a court "should incorporate state law as the federal rule of decision." *Kamen v. Kemper Financial Serv. Inc.*, 500 U.S. 90, 98 (1991) (internal quotation and brackets omitted). Indeed, unless a uniform rule of decision is needed, or unless the application of the particular state law in question "'would frustrate specific objectives of the federal programs,'" this Court has ruled that a federal court must apply state law in interpreting a federal statute. *Id.* (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)).

The Sixth Circuit, however, ignored the state partnership law of New York, where Ernst & Young was formed. It did not consider whether the state-law definition of "partner" would conflict with the goals of the ADEA or ERISA; nor did it consider the effect that a national partnership law would have on commercial relations predicated on state law. It made no finding that the ADEA or ERISA require a uniform definition of "partnership." In short, it made none of the analyses required by this Court before creating federal rules of partnership based on "the common-law principles . . . codified in the UPA," that it then said Ernst & Young had failed to meet. *Simpson*, 100 F.3d at 443-44.

By failing to give specific state partnership law controlling effect in determining who is a partner under the ADEA and ERISA, the Sixth Circuit has created a federal body of partnership law divorced from the particular state laws that business partners rely upon in forming their associations. The immediate effect of this decision is manifest: a bona fide partner under state law was held not to be a partner under federal law. Worse yet, the characteristic of the partnership that the court seemed to find most inappropriate is one of the more common features of large and even medium-sized partnerships: the partners' delegation of management responsibility to an executive committee. Most

states allow partners to agree to delegate their management rights, but the new federal rules of decision announced by the Sixth Circuit apparently would not do so. Bona fide partnerships may thus feel constrained to reorganize their management structures to conform with the new federal partnership rules — or face potentially crippling liabilities under ERISA, the ADEA, and Title VII when their non-managing partners are found to be employees.

Creating and regulating business associations is traditionally a state role, yet the decision below creates a federal standard for partnership formation that is inconsistent with most states' laws. Having competing rules of partnership under federal and state law would inject uncertainty into partnership formation and place dealings among partners "under a federally created cloud." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). Moreover, states will no longer be able to respond effectively to business needs by inventing new, innovative approaches to partnership, for partnerships will still have to conform to the Sixth Circuit's criteria for partnership. Because the Sixth Circuit's decision will cause the very problems that this Court sought to avoid when it required federal courts to consider whether to apply existing state law before fashioning an independent federal rule of decision, certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FORCES VALID STATE PARTNERSHIPS TO RESTRUCTURE, THREATENS THEM WITH UNEXPECTED LIABILITIES, AND UNDERMINES STATE SOVEREIGNTY.

The effect of the Sixth Circuit's failure to follow this Court's teaching will be manifold. Since the general, federal partnership rules that it created differ significantly from most state laws, countless partnerships that are bona fide under state law may be impelled to restructure to conform with the new federal rules. If they do not reorganize, they risk potentially crippling liabilities if their former business partners bring suit under federal employee-protection statutes like the ADEA and ERISA. Moreover, the existence of a general, federal law of partnership

could stymie some of the states' recent and popular innovations in partnership law and hinder the states' ability to respond to changing economies by creating new forms of business association like the limited liability partnership.

A. The decision below would require partnerships to restructure.

In essence, the Sixth Circuit required Ernst & Young partners to meet the default provisions of the Uniform Partnership Act in order to be considered "partners" under federal law. *Simpson*, 100 F.3d at 443-44. The UPA provides a "standard form contract" that is designed for the small, "closely held business in which all of the owners are active participants and the departure of any owner usually has significant consequences." I A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership*, § 1.02(b), at 1:25-26 (1996). Since partnerships are as varied as the businesses in which they engage, all state partnership statutes allow partners to reject the standard form of partnership of the UPA and tailor their relationship through their partnership agreement to meet the particular needs of their business. *Id.*; *see, e.g.*, N.Y. Partnership Law § 40.

The decision below effectively negates these long-standing state laws, for purposes of the ADEA, ERISA, and other federal employment laws, by holding a partnership to the standards set out in the UPA rather than the standards established in its partnership agreement or even in its own state's statute. Virtually all of the factors that the court listed — the right to participate in management, the ability to control and operate the business, voting rights, the right to act as agent, the right to share in the profits, the duty to share in losses, exposure to liability, fiduciary duty, employment security, investment in the firm, ownership of firm assets, and compensation based on profits, *Simpson*, 100 F.3d at 443-44 — are elements that New York law, for example, allows the partners to reject, either by agreement or by registering with the State. N.Y. Partnership Law § 40 (allowing partners to agree to vary or eliminate the right to participate in management, the ability to control and operate the business, voting rights, the

right to share in the profits, the duty to share in losses, employment security, investment in the firm, and compensation based on profits); *id.* § 51 (allowing partners to agree to vary or reject co-ownership of firm assets); *id.* § 121-1500 (allowing partners to register for limited liability status that eliminates their individual exposure for the partnership's liabilities). Under the Sixth Circuit's rules, however, partners could not vary or eliminate any of these standard-form features without risking the validity of their partnerships under federal law.

The problem, of course, is that most modern partnerships are based on partnership agreements that *do* vary and even eliminate one or more of the partnership features provided by the UPA default provisions. The standard form of partnership is a far cry from the modern, complex partnerships that predominate business today. *See* Richard, *How Firms Manage*, 18 Pa. Law. 20, 22 (1996); I A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership*, § 1.02(b), at 1:25-26.

The legal profession provides an apt illustration of how out of step the standard form of partnership — the form that the Sixth Circuit would impose on all partnerships — is with modern economic conditions. As a consequence of the dramatic growth that law firms and partnerships have experienced over the past few decades, most law-firm partnerships have adopted some form of centralized management. Richard, *How Firms Manage*, 18 Pa. Law. at 22; Smith, *After the Flood: How Strategic Planning Helped One Firm Weather Changing Times*, 11 Of Counsel 4, 5 (Feb. 3, 1992); *see* Samuelson, *The Organizational Structure of Law Firms: Lessons From Management Theory*, 51 Ohio St. L.J. 645, 652 (1990) (explaining that "[l]eadership in law firms is exercised by one or several managing partners"); *see generally* R. Nelson, *Partners With Power: The Social Transformation of the Large Law Firm* 91 (1988) (describing traditional law firm management as involving "direct administration by leading lawyers, aided only by a part-time managing partner, with no regular monitoring of internal performance measures or financial information"). Even firms with just 12 to 15 partners find that the democratic governance typical of UPA "standard form"

partnerships is "too cumbersome to be practical." Richard, *How Firms Manage*, 18 Pa. Law. at 20. Such firms usually delegate management and control to committees that handle the details of day-to-day governance. Larger firms find that committee-style governance can be as unwieldy as democratic governance, and "typically organize in a more hierarchical fashion." *Id.* at 21. Some have even adopted corporate-style matrix organizations, complete with CEOs. Samuelson, *The Organizational Structure of Law Firms: Lessons From Management Theory*, 51 Ohio St. L.J. at 671-72 n.194.

The move toward centralized management is not peculiar to law firms, however, for it stands to reason that increases in size, regardless of line of business, "create[ ] pressure on organizations to rationalize their structures by developing more sophisticated managerial and administrative frameworks." Samuelson, *The Organizational Structure of Law Firms*, 51 Ohio St. L.J. at 645; *accord* II A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership*, § 6.03(b), at 6:39-40 (1996). It is not difficult to see why the UPA's provision for "equal control" is ill-suited to efficient business operation in an organization of any appreciable size. "Democratic governance often fails to produce a coherent managerial approach and the time required to reach decisions is substantial." *Id.* at 652; *see* Richard, *How Firms Manage*, 18 Pa. Law. at 20. Moreover, when professionals are required to consider, debate and vote on even the most trivial aspects of doing business — such as negotiating and renegotiating leases and employment contracts — they have considerably less time in which to practice their professions and generate income for themselves and their firms. Many professionals prefer to leave the more mundane aspects of business operation to a process agreed upon in a partnership agreement.

Unfortunately, they may no longer have that choice. Partnerships that want to ensure that they measure up to the rule of law established below may have to reorganize their management structure to conform to the UPA's standard form. While it is true that the court below created a general, multifaceted federal test for partnership, it is also true that three

of the eleven factors that it listed — the right to participate in management, the ability to control and operate the business, and voting rights — would require a more traditional management structure than many modern firms have.

Moreover, many of the remaining factors of the Sixth Circuit's test (such as exposure to personal liability and compensation based solely on ownership share) are similarly lacking in modern partnerships. *See, e.g.*, Keating, Donn, Coleman & Hester, *Limited Liability Partnerships: The Next Step in the Evolution of the Unincorporated Business Organization*, 51 Bus. Law. 147, 147 (1995) (discussing development of limited liability in modern partnerships); Smith, *After the Flood*, 11 Of Counsel, at 6 (discussing performance- and responsibility-based partner compensatic 'n modern partnerships); *Partner Compensation: How Three Firms Split the Take*, 95-5 Compensation & Benefits for L. Off. 1 (1995) (same). Contrary to the assumption of the court below, it is not uncommon for partnerships to base profit distribution on partner performance rather than on some ownership formula, II A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership*, § 6.02(b), at 6:11-12, just as it is not uncommon (as some of the *amici* can attest) for firms to assist new partners in getting loans to cover the cost of their capital contributions. In fact, many modern professional services partnerships have all three features: centralized management, assistance in securing loans for capital contributions, and performance-based partner compensation. If such firms want to ensure that their partners are considered bona fide under federal law, they may have to reorganize their business and financial structures to meet the new federal criteria.

B. Under the decision below, partnerships that do not restructure may be subject to huge, unanticipated liabilities.

Since conforming to the Sixth Circuit's idea of partnership would entail the adoption of unwieldy management structures, inappropriate compensation models, and individual exposure to unlimited liability, many modern partnerships may prefer to retain

their current, state-approved form. Doing so, however, could invite lawsuits from disgruntled former partners who could point to the firm's centralized management, performance-based compensation, and other modern features to show that they were really "employees" under the Sixth Circuit's test, despite their status as bona fide partners and co-owners under state law.

If bona fide partners under state law can be "employees" under the ADEA, for example, partnerships with a mandatory retirement age for partners may find themselves unexpectedly subject to lawsuits for age discrimination. As employers, business partners cannot discriminate against their employees based on age. But partners can agree amongst themselves that they will retire from active participation in the business when they reach a certain age. Such agreements, which are not uncommon, do not violate the ADEA when they apply only to bona fide partners. *See, e.g.*, Schwidetzsky, *Is It Time to Give the S Corporation a Proper Burial?*, 15 Va. Tax Rev. 591, 622-23 (1996) (noting that accounting firms "often have mandatory retirement ages for partners"). But if a partner who agreed to mandatory retirement later claims that he was actually an employee under the Sixth Circuit's criteria, he could sue the partnership for age discrimination under the ADEA even if he was an admittedly bona fide partner under state law.

More importantly, business partners will suddenly find that their benefits and pension plans could now be subject to ERISA. *See Simpson v. Ernst & Young*, 879 F. Supp. 802, 828 (S.D. Ohio 1994) (finding partnership liable for over $700,000 in ERISA damages after finding that "partner" was an "employee"). ERISA does not cover retirement plans that include only partners. 29 C.F.R. § 2510.3-3(b), (c)(2); *see Robertson*, 798 F.2d at 871. But a pension plan that includes even *one* employee is subject to ERISA's participation, funding, and vesting requirements. *Ehrlich v. Howe*, 848 F. Supp. 482, 486 (S.D.N.Y. 1994); *see Simpson*, 879 F. Supp. at 812, 814-15. If a partnership fails to restructure to conform to the Sixth Circuit's federal partnership rules, a federal court could rule that its partner pension plan includes employees, even where all of the participants in the plan

are bona fide partners under the applicable state law. If one or more of those partners fails to meet the federal partnership criteria set out in the decision below, the partnership may well find itself subject to huge, and potentially crippling, liabilities for unfunded pension benefits.

C. The new federal rules fashioned by the lower court undermine the states' ability to foster business development.

The decision below would upset not only the expectations of business partners who relied on particular state laws in forming their partnerships, but also the ability of the states themselves to respond effectively to business needs. Creating and regulating business associations is traditionally a state role, but the decision below establishes a general, federal standard for partnership formation that is inconsistent with most states' laws. Since partnerships will have to conform to the new federal law of partnership as well as any state standards, any attempt by the states to respond to changing business conditions by changing the parameters of partnership law could be ineffective. The decision below could thus effectively freeze the evolution of partnership law.

That freeze would come during the midst of a major overhaul of state partnership law. The past few years have seen both the complete revision of the Uniform Partnership Act and the birth (and rapid growth) of the Limited Liability Partnership. A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Limited Liability Partnerships and the Revised Uniform Partnership Act* xvii (1997). After the savings-and-loan debacle in the 1980s resulted in a slew of malpractice suits against the law and accounting firms that had done work for failed savings-and-loans, the limitations of the traditional partnership form came home to roost, for even partners who had nothing to do with their firms' savings-and-loan work were held liable for their partners' conduct. *Id.* at 3. Business owners lobbied for another option, and states seeking business development responded by creating the

Limited Liability Partnership. *Id.*; Keating, Donn, Coleman & Hester, *Limited Liability Partnerships* 51 Bus. Law., at 158.

Limited Liability Partnerships ("LLPs") are general partnerships subject to all of the same laws as regular partnerships, with the added benefit that the partners are not individually liable for the debts and liabilities of the partnership. Thus, a modern partnership with centralized management and performance-based compensation can register for limited-liability status that protects the partners from personal liability. Since an LLP is the same general partnership that it was before it registered, *see, e.g.*, N.Y. Partnership Law § 121-1500(d), it is subject to the same default rules as other partnerships — and has the same ability to draft around them. The LLP provision simply allows one more way in which to deviate from the standard form of partnership.

The first Limited Liability Partnership ("LLP") laws offered partners protection only from certain forms of tort liability. A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Limited Liability Partnerships and the Revised Uniform Partnership Act* at 3. But Delaware, in keeping with its "policy of becoming the most favorable state for business organizations," *id.* at 10, expanded the liability shield to cover any misconduct, tort or contract. *Id.* at 11. Other business-oriented states followed suit, and New York expanded the protection even further to shield partners from liability for essentially *all* partnership obligations of any kind. *Id.* at 12-13. By 1996, just five years after the introduction of the LLP, forty-six states and the District of Columbia had adopted LLP provisions, many offering liability protection indistinguishable from that given to corporations. *Id.* at 16.

Businesses have been quick to adopt the new form. After 127 years as a general partnership, Goldman, Sachs & Co. converted to an LLP. *Id.* All of the "Big 6" accounting firms have converted, as have thousands of other partnerships. *Id.* (even as early as 1995, over 800 law firms alone had converted). Courts throughout the country have even modified the rules governing

the legal profession to allow attorneys to practice in Limited Liability Partnerships. *See, e.g.*, Ohio Gov. Bar R. III, § 1. The wide and rapid acceptance of the new form of business partnership demonstrates the states' success in meeting the evolving needs of business.

That success, however, could be undermined if the decision below were to stand. If federal courts refuse to recognize partners as "bona fide" when they do not share in the losses and liabilities of the partnership, particularly when they have also delegated their management and control rights to others, some of the thousands of partnerships that have registered for limited liability status will no doubt find that the advantages offered by their states' laws have been completely negated by the federal courts. The states' authority to create new business structures to respond to modern business needs will be severely undermined, and laws meant to make state partnerships more secure in today's competitive marketplace will instead add to the uncertainty of a partnership's status under federal law.

II. THE SIXTH CIRCUIT'S DECISION TO FASHION FEDERAL RULES OF PARTNERSHIP LAW CONFLICTS WITH THE DECISIONS OF THIS COURT.

The many adverse effects of the decision below could have been averted if the court had simply followed this Court's teaching. When Congress fails to define a statutory term that is traditionally a matter of state law, this Court looks to the relevant state's law to determine the term's meaning. *See, e.g.*, *De Sylva v. Ballentine*, 351 U.S. 570, 580-82 (1956) (applying California family law to determine meaning of "child" in Copyright Act); *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (using New Mexico law to define "property" under Bankruptcy Act). Likewise, when Congress leaves a gap in a federal statute, this Court presumes that specific state laws should fill the gap, "particularly . . . in areas in which private parties [expect to] be governed by state-law standards," such as corporate law. *Kamen*, 500 U.S. at 98.

In *United States v. Kimbell Foods*, this Court held that the choice between using state law or fashioning federal rules to interpret a federal statute depends on (1) whether the issue requires "a nationally uniform body of law"; (2) "whether application of state law would frustrate specific objectives of the federal programs [or statutes involved]"; and (3) whether "application of a federal rule would disrupt commercial relationships predicated upon state law." *Kimbell Foods*, 440 U.S. at 728-29. There is no reason why the same principles should not apply here.

The Sixth Circuit, however, did not consider any of these principles before forging general federal rules of partnership law that are completely divorced from the myriad of state laws under which countless partnerships, including those of the *amici*, were formed. This Court's teaching, however, cannot simply be ignored. Had the lower court followed the principles applied in *De Sylva* or the analysis set forth in *Kimbell Foods*, it would have had to use the existing law of New York to provide the federal definition of "partners" who are not "employees" protected under the ADEA and ERISA. The Sixth Circuit's failure to apply these principles is directly contrary to the decisions of this Court.

A. Determining whether an ERISA or ADEA plaintiff is a bona fide partner does not require a nationally uniform rule of law.

The determination of who is a "partner," and thus not an "employee" protected by ERISA and the ADEA, is a classic example of the type of decision that this Court leaves to the "permissible variations" of state law. *De Sylva*, 351 U.S. at 581; *see United States v. Yazell*, 382 U.S. 341, 354-56 (1966) (comparing cases where Court has found need for uniform standard against those where state law sufficed). Federal statutes that use standards traditionally established by state laws — the definition of "child" or the powers of corporate directors, for example — do not require uniform federal solutions because Congress enacted the statutes "against the background of existing state law," presumably with the assumption that those state laws

would provide the controlling standards. *Burks*, 441 U.S. at 478. *See, e.g.*, *Kamen*, 500 U.S. at 98 (borrowing state law on powers of corporate directors to interpret federal securities law); *Kimbell Foods*, 440 U.S. at 728 (incorporating state commercial law to determine priority of liens arising from federal loan programs); *Burks*, 441 U.S. at 477-79 (requiring application of state corporate law to determine power of corporate directors to terminate derivative suit under Investment Company Act); *De Sylva*, 351 U.S. at 580-82 (applying state family law to determine meaning of "child" in Copyright Act).

In *De Sylva v. Ballentine*, for example, this Court looked to state law to determine whether an illegitimate child was a "child" of a deceased author, entitled to renew the author's copyright under the Copyright Act. *De Sylva*, 351 U.S. at 580. Despite the variations in state-law definitions of "child," the Court used California family law to define "child" since family law is a traditional area of state, not federal, concern:

> To decide who is the widow or widower of a deceased author, or who are his executors or next of kin, requires a reference to the law of the State which created those legal relationships. The word "child[ ]," although it to some extent describes a purely physical relationship, also describes a legal status not unlike the others. To determine whether a child has been legally adopted, for example, requires a reference to state law.

Id. Similarly, the Court in *Burks v. Lasker* held that because "[c]orporations are creatures of state law," "the first place one must look to determine the powers of corporate directors is in the relevant state's corporation law." *Burks*, 441 U.S. at 478 (quotation omitted). As this Court has consistently held, "[t]he presumption that state law should be incorporated into federal common law is particularly strong" — and thus the need for uniformity correspondingly weaker — "in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98.

Indeed, matters of traditional state-law concern have not been at issue in those cases in which the Court has found a need for national uniformity, and thus a need to create a federal rule. *Yazell*, 382 U.S. at 354-55 (describing cases finding need for uniform rule). As this Court observed in *Yazell*, the decisions choosing general federal standards "typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation." *Id.* at 354. Generally, such programs neither implicate traditional areas of state-law concern, nor involve the rights of private parties who entered legal relationships that they expected to be governed by state law.

This case, however, does both. Partnerships, like corporations and domestic relations, are creatures of state law. *Zola v. Gordon*, 685 F. Supp. 354, 364 (S.D.N.Y. 1988); *Hauer v. Bankers Trust New York Corp.*, 65 F.R.D. 1, 3 (E.D. Wisc. 1974). Since partners expect that their rights and obligations as partners will be governed by state law, federal courts have generally looked to the law of the relevant state to determine whether someone is a bona fide partner. *Fegley v. Higgins*, 19 F.3d 1126, 1132 (6th Cir.) (borrowing Michigan partnership law in holding partners jointly liable for co-partner's violation of the Fair Labor Standards Act), *cert. denied*, 115 S. Ct. 203 (1994); *Ballard v. United States*, 17 F.3d 116, 118 (5th Cir. 1994) (applying Texas law to determine if person was a partner for employment tax purposes); *In re Phillips*, 966 F.2d 926, 933 (5th Cir. 1992) (applying Texas law because defining "general partner" was "exclusively the task of state partnership law"); *In re 2111 Associates-Chicago*, 580 F.2d 705, 708 (4th Cir. 1978) (looking to Virginia law to determine meaning of "partnership" under the Bankruptcy Act). Even this Court implicitly recognized that partners expect their relationships to be governed by particular state laws when it borrowed Pennsylvania partnership law to decide whether a Pennsylvania partnership was separate entity for Fifth Amendment purposes. *Bellis v. United States*, 417 U.S. 85, 96-100 (1974).

Moreover, there simply is no need for a uniform definition of partnership under the ADEA and ERISA. Courts must already

look to state law to define "employee" under those statutes, *see Madonia v. Blue Cross & Blue Shield*, 11 F.3d 444, 449 (4th Cir. 1993) (citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992), and holding that state law must be used "[t]o discern common law principles" applicable as a result of *Darden*'s mandate to fill gaps by looking to established common-law meanings), *cert. denied*, 511 U.S. 1019 (1994), so using state law to define "partner" will not entail any extra effort in administering the statutes. *Kimbell Foods*, 440 U.S. at 729-33 (adoption of uniform federal law not warranted by administrative convenience where agency already considers state law in applying statute). There is thus no need to create a uniform federal rule of partnership.

B. Applying state partnership law to determine whether an ADEA or ERISA plaintiff is a bona fide partner would not frustrate the objectives of the ADEA or ERISA.

Congress intended the ADEA and ERISA to protect "employees" (more precisely, employees who are not specifically exempted), and *only* employees, from prohibited employment practices. *See* 29 U.S.C. § 621(b); *id.* §§ 1002(7), 1140. Neither statute protects bona fide business owners, whether partners or other employers; thus, neither statute embodies an unlimited federal policy of eradicating discrimination. *See Wheeler*, 825 F.2d at 275-76. Instead, the statutes' goals are expressly limited by the scope of their prohibitions and remedies to protecting employees.

Applying state law to determine who is or is not a partner will not frustrate the statutes' goal of protecting employees, even if it turns out that a plaintiff is a true business partner under a particular state's law, and not an employee entitled to sue under the ADEA or ERISA. State law "cannot be considered 'inconsistent' with federal law merely because [it] causes the plaintiff [in a particular case] to lose the litigation." *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978); *see also Burks*, 441 U.S. at 479. Moreover, there is nothing irrational or inequitable about denying partners the same protection against discrimination or

retaliation that is afforded to employees. As the Fifth Circuit has explained, "[e]mployees in the traditional employer-employee relationship are more vulnerable than partners in a partnership are to abuses because . . . a partner has more control and input than does an employee." *Robertson*, 798 F.2d at 870. Moreover, partnerships "contain[ ] a self-policing feature largely absent in the typical employer-employee relationship" because "partners have an incentive not to agree to provisions that may harm certain members of the partnership because each partner knows that he could end up being the partner who is harmed." *Robertson*, 798 F.2d at 870. And to the extent that partners find it expedient to delegate their control to a managing partner or to a management committee, which will often be the case in large partnerships, there is every reason to honor their "abdication of rights" if it is valid under generally applicable state partnership law. *Wheeler*, 825 F.2d at 274. *See also Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1044 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986).

Although it would frustrate federal anti-discrimination laws and ERISA to permit employers to avoid their strictures by merely labeling their employees as "partners," no state attaches talismanic significance to whether or not the parties term their relationship a "partnership." *See generally* I A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership* § 2.05(c), at 2:56, 59-60. Certainly, the State of New York does not. *See, e.g.*, *Martin v. Peyton*, 158 N.E. 77, 78 (N.Y. 1927) (holding that, because express statements in contracts "may be a mere sham to hide the real relationship," express statements regarding partnership intent "are not conclusive" because "[m]ere words will not blind us to the realities"); *Brodsky v. Stadlen*, 526 N.Y.S.2d 478, 480 (App. Div. 1988) ("It should be noted that calling an organization a partnership does not make it one."). Absent such a situation, there is no federal objective that is frustrated in any way by applying and giving controlling effect to the pertinent state business-associations law in deciding whether an individual is an "employee" or a "partner" for these purposes.

See De Sylva, 351 U.S. at 581 (as long as state does not define "child" in a way contrary to ordinary usage, state law controls).

C. Applying a federal definition of "partner" under the ADEA and ERISA would disrupt commercial relations predicated upon state partnership law.

Because partnership agreements are drafted against the background of state partnership law, there is ordinarily a substantial degree of certainty in forming partnerships: so long as the detailed provisions of the state's law are followed, a valid partnership will result. Business people form partnerships with the expectation that the law of the particular state where they are organized will govern their rights, obligations, and dealings as partners. *Cf. Kimbell Foods*, 440 U.S. at 739-40 (businessmen depend on state commercial law in structuring financial transactions). That expectation, however, would be upset by the application of a general federal rule of partnership that differs from the state's rules.

Having competing rules of partnership under federal and state law would inject uncertainty into partnership formation and place dealings among partners "under a federally created cloud." *BFP v. Resolution Trust Corp.*, 511 U.S. at 544. Under the Sixth Circuit's decision, for example, partners who relied on their state partnership law to form a limited liability partnership with centralized management could now find that those partners who delegated their management rights, and thus have neither management control nor personal liability for partnership losses, are employees for some purposes under federal law, but partners for other purposes under state law. Such a state of affairs would be "potentially chaotic," as the Tenth Circuit has explained, because "no one [would] ever quite know[ ] who is an employee/partner and who is a "'pure' partner." *Wheeler*, 825 F.2d at 274.

Moreover, the existence of a competing body of federal partnership law would impair the ability of states to adapt their business associations laws to the ever-changing needs of the modern economy. Courts should not deal such a blow to federal-

ism (much less commerce and freedom of association) without clear direction from Congress. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (applying this principle to exclude state judges from the scope of the ADEA). Indeed, as then-Judge Ruth Bader Ginsburg wrote in a joint opinion with one of her colleagues: "[I]f Congress intended displacement of state law . . . one would expect to find a clear statement to that effect. Particularly in an area traditionally in the state's domain, such as sales law, the likelihood is that the national legislature, when it intervenes, and does not say otherwise, opts for the little rather than the much." *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) (footnote omitted), *cert. denied*, 482 U.S. 915 (1987).

D. The Sixth Circuit should have applied state law to determine whether Simpson was a "partner."

Because there is no need for uniform rules of partnership under federal employment statutes like the ADEA and ERISA, the Sixth Circuit should have followed the analysis of *Kimbell Foods* before fashioning a general federal rule of decision. If it had, it would have considered whether the application of state law would frustrate the goals of the ADEA and ERISA and, conversely, whether the application of federal rules defining "partnership" would disrupt commercial relationships based on state law. The Sixth Circuit, however, made no such analysis before creating its general federal rules for partnership. *See Simpson*, 100 F.3d at 443-44.

This mistake was no mere technical error on the part of the Court of Appeals. Even if it is true that "the general indicia of partners and partnerships are very similar across state lines," *Wheeler*, 825 F.2d at 267, the fact remains that partnership laws do vary, to a greater or lesser degree, from state to state. *See* I A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership* § 1.02(b), at 1:27 ("Despite the prevalence of the U.P.A. and the R.U.P.A., and their exhortations for uniform interpretation, there are variations in the wording of the acts as passed by the several legislatures and in the way the act has been construed by the courts.") (footnotes omitted). Because such "nuance[s] can

be important" even if the laws of the various states otherwise bear much in common, a federal court simply cannot abstract general principles of law as a substitute for a detailed analysis of the law of the relevant state. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir.), *cert. denied,* 116 S. Ct. 184 (1995). When this Court's decisions require the incorporation of a specific state law — New York law — as the federal rule of decision in interpreting a term in federal law, the Sixth Circuit is simply not free to refer instead to some generalized version of state law.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, certiorari should be granted.

Respectfully submitted,

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May 1, 1997

APPENDIX

APPENDIX

This brief *amici curiae* is submitted on behalf of the following law firms.

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Davis Polk & Wardwell (a New York partnership)
Dickinson, Wright, Moon, Van Dusen & Freeman (a Michigan partnership)
Fried, Frank, Harris, Shriver & Jacobson (a New York partnership)
Fulbright & Jaworski L.L.P. (a Texas registered limited liability partnership)
Jones, Day, Reavis & Pogue (an Ohio partnership)
King & Spalding (a Georgia partnership)
Latham & Watkins (a California partnership)
O'Melveny & Myers LLP (a California limited liability partnership)
Paul, Hastings, Janofsky & Walker LLP (a California partnership)
Seyfarth, Shaw, Fairweather & Geraldson (an Illinois partnership)
Shearman & Sterling (a New York partnership)
Skadden, Arps, Slate, Meagher & Flom LLP (a New York limited liability partnership)
Vorys, Sater, Seymour and Pease (an Ohio partnership)
Weil, Gotshal & Manges LLP (a New York limited liability partnership)
Wiley, Rein & Fielding (a D.C. partnership)

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MAY 1 1997

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ERNST & YOUNG LLP,

Petitioner,

v.

P. LARUE SIMPSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF ARTHUR ANDERSON LLP, COOPERS & LYBRAND L.L.P., DELOITTE & TOUCHE LLP, KPMG PEAT MARWICK LLP, AND PRICE WATERHOUSE LLP, IN SUPPORT OF PETITIONER

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In The Supreme Court of the United States
OCTOBER TERM, 1996

No. 96-1553

ERNST & YOUNG LLP, PETITIONER

v.

P. LARUE SIMPSON, RESPONDENT

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

MOTION OF ARTHUR ANDERSEN LLP, COOPERS & LYBRAND L.L.P., DELOITTE & TOUCHE LLP, KPMG PEAT MARWICK LLP, AND PRICE WATERHOUSE LLP, FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of this Court, Arthur Andersen LLP, Coopers & Lybrand L.L.P., Deloitte & Touche LLP, KPMG Peat Marwick LLP, and Price Waterhouse LLP (collectively, "*amici*"), hereby move for leave to file the attached brief *amici curiae*. Petitioner has granted but respondent has refused to grant consent for *amici* to file a brief in this case.

Amici are five national professional services firms, each of which is registered as a partnership under the law of the particular state in which it was organized. Based on its chosen legal form of business operation, each firm structures its affairs and makes business decisions in accordance with state and federal laws that govern various aspects of its partnership, including the partnership's respective, and often very different, duties in relation to its partners and its employees.

Amici have a substantial interest in the resolution of the question presented for the Court's review in this case. The decision below -- which created a federal common-law definition of partnership -- compromises the ability of *amici* rationally to structure and conduct their affairs in reliance on their chosen form of business operation. The Sixth Circuit's decision is of great concern to *amici* because it injects wholesale uncertainty into the settled legal relationships that historically flow from the establishment of a valid partnership pursuant to state law. Such massive uncertainty will impose a price on *amici*, and on the public at large.

The attached brief illustrates the adverse effect of the decision below on professional services firms and other business partnerships. *Amici* seek to bring to the Court's attention some considerations relevant to the question presented that have not been fully developed by the parties. *Amici* therefore respectfully request leave to file the attached brief *amici curiae*.

May 1, 1997

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No. 96-1553

In The Supreme Court of the United States

OCTOBER TERM, 1996

ERNST & YOUNG LLP, PETITIONER

v.

P. LARUE SIMPSON, RESPONDENT

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF *AMICI CURIAE* OF ARTHUR ANDERSEN LLP, COOPERS & LYBRAND L.L.P., DELOITTE & TOUCHE LLP, KPMG PEAT MARWICK LLP, AND PRICE WATERHOUSE LLP, IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici are five national professional services firms, each of which decided to constitute itself as a partnership under the law of the particular state in

[1] No counsel for any party had any role in authoring this brief, and no person other than the named *amici* and their counsel made any monetary contribution to its preparation or submission.

which it was organized.[2] Based on its chosen legal form of business operation, each firm structures its affairs and makes business decisions in accordance with state and federal laws that govern various aspects of its partnership, including the partnership's respective, and often very different, duties in relation to its partners and its employees.

Absent plenary review by this Court, the decision of the Sixth Circuit below will substantially compromise the ability of many partnerships nationwide -- including *amici* -- rationally to structure and conduct their affairs in reliance on their chosen form of business operation. The Sixth Circuit has created a new, multi-faceted, and essentially subjective, *federal* definition of partnership that disregards whether an entity is a duly-constituted partnership under state law. The Sixth Circuit's creation of a federal common-law definition of partnership is contrary to this Court's precedents and at odds with the decisions of other federal appellate courts. Most strikingly, the Sixth Circuit's decision injects wholesale uncertainty into the settled legal relationships that historically flow from the establishment of a valid partnership. Such massive uncertainty could itself impose a tremendous price on *amici*, and on the public at large.

For the above reasons, *amici* submit this brief in support of Ernst & Young's petition for certiorari.

DISCUSSION

In this case, a partner in a partnership duly constituted under state law successfully sued his former partners under the theory that he was an "employee"

---

[2] Arthur Andersen is organized as a limited liability partnership under Illinois law; the balance of *amici* are registered as limited liability partnerships under Delaware law.

for purposes of state and federal statutes that grant "employees" -- but not partners -- a cause of action for a variety of employment-related claims. *See Simpson v. Ernst & Young LLP*, 100 F.3d 436, 439 (6th Cir. 1996).

Prior to plaintiff P. LaRue Simpson's involuntary separation from the accounting firm of Ernst & Young, everyone -- including Simpson -- believed that Simpson was a partner and co-owner of the firm. *Simpson v. Ernst & Young LLP*, 850 F. Supp. 648, 654 (S.D. Ohio 1994), *aff'd*, 100 F.3d 436 (6th Cir. 1996). But when his fellow partners decided to remove Simpson from the partnership, the forty-six year-old Simpson filed suit against his former partners under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 -- two federal statutory schemes that, by their terms, grant protection to employees, but not to partners. *Simpson*, 850 F. Supp. at 664.

Ernst & Young filed a motion for summary judgment on the ground that Simpson had been a partner and co-owner of the accounting firm and thus that he could not advance a claim that he was an "employee" entitled to protection under the ADEA and ERISA. The district court denied Ernst & Young's motion on the ground that there were genuine issues of material fact concerning Simpson's employment status.

In reaching its decision, the district court repeated the truism that "labeling [Simpson] a 'partner' does little to illuminate the actual nature of his employment relationship with Ernst & Young." *Simpson v. Ernst & Young LLP*, No. 91-196, at Pet. App. 18a (S.D. Ohio filed Mar. 26, 1993) (reproduced in Pet. App. at 15a-27a). But instead of examining whether the "partner" label placed on Simpson accurately reflected Simpson's

status as a *bona fide* partner of Ernst & Young under the law of New York, the state in which the partnership was established, the court embarked on a subjective inquiry to ascertain "the economic reality of plaintiff's employment relationship with Ernst & Young . . . by examining the totality of circumstances under the standards courts have traditionally used to distinguish employees and partners such as those set forth in the [Uniform Partnership Act] and the dual factors of compensation and control." Pet. App. 19a.

Examining Ernst & Young's partnership agreement under this newly-created federal standard, the district court divined that Simpson was, in fact, not a partner of the firm, chiefly because he purportedly "had no voice in the management of Ernst & Young, while more powerful individuals -- the Chairman and other members of the Management Committee -- held sway over Ernst & Young's destiny." *Id.* In so holding, the court acknowledged that the delegation of management power is not determinative of partnership status under New York law, but nonetheless concluded that "at some point, delegation destroys partnership status," and that Ernst & Young's committee structure violated that principle. *Simpson*, 850 F. Supp. at 662-63. The district court therefore concluded that Simpson qualified as an employee for purposes of his statutory claims.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the district court, invoking the Uniform Partnership Act and federal case law to devise a subjective, multi-factor test to determine whether a business entity satisfies federal common-law criteria for partnership status. *Simpson*, 100 F.3d at 443. Evaluating Simpson's status under these criteria, the Sixth Circuit concluded that Simpson "d[id] not qualify as a partner for purposes of ADEA [or] ERISA." *Id.*

The courts below disregarded two critical factors in concluding that Simpson could shed his previously undoubted partnership status to avail himself of the protections afforded employees under state and federal laws. First, the district court rejected, and the Sixth Circuit flatly ignored, the crucial fact that Ernst & Young was a valid partnership under New York law, the governing law of the state in which Ernst & Young was established and pursuant to which it was organized. Pursuant to New York law, even a partner's complete delegation of influence over partnership decisions does not necessarily alter that partner's employment status. *See* N.Y. Partnership Law §§ 11, 40 (McKinney 1988 & Supp. 1997); *see also Tenney v. Insurance Co. of N. Am.*, 409 F. Supp. 746, 749 (S.D.N.Y. 1975).

Second, both courts discounted the fact that Ernst & Young's structure for internal governance was the product of a voluntary agreement to which all Ernst & Young partners, including Simpson, were signatories. Pet. App. 21a ("It is of no significance for purposes of analyzing [Simpson's] actual employment relationship with Ernst & Young that plaintiff voted in favor of the merger or signed the partnership agreement."). In sum, the decisions below rendered state law -- and the underlying business decision to establish an entity in the particular form of a partnership pursuant to state law -- irrelevant to the determination whether an Ernst & Young partner was in actuality an "employee," able to sue his former partners under various federal and state statutes.

Plenary review is warranted here because the Sixth Circuit's decision -- which cannot be reconciled with decisions of this Court and conflicts with decisions of other courts of appeals -- leaves in its wake intolerable confusion for business entities that previously had ordered their affairs in reliance on state law. *Amici*

thus urge the Court to grant plenary review of the petition in order to resolve the confused state of the law and to restore the ability of partnerships to manage their businesses in accordance with the law of the state in which they were established.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT

Whether federal statutes such as ERISA and ADEA apply to partners in professional-service partnerships duly constituted under state law presents an important and recurring issue that will not benefit from further consideration in the lower federal courts. This is not a case in which the error below consists only of "erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. Instead, the Sixth Circuit has -- in conflict with the teaching of this Court and other federal appellate courts -- decided that partners can conveniently transform themselves and assume the "employee" label to enable them to sue their former partners under various federal employment laws, *even if* those individuals were partners of a validly-established partnership.[3]

---

[3] The consequence of this issue extends beyond the application of the ADEA and ERISA to such partners, to include questions of the applicability of other federal statutory schemes whose jurisdictional reach hinges in part on the definition of "employee." *See, e.g.*, 42 U.S.C. § 2000e-2(a) (Civil Rights Act of 1964); 29 U.S.C. § 206(d)(1) (Equal Pay Act of 1963); 42 U.S.C. § 12112(a) (Americans with Disabilities Act of 1990); 29 U.S.C. §§ 2611(3), 2612(a)(1), 2617 (Family and Medical Leave Act of 1993); 29 U.S.C. § 652(6) (Occupational Safety and Health Act of 1970).

The Sixth Circuit's decision highlights the existing confusion among the federal appellate courts on the role of state law in determining partnership status. Given the confused state of the law, partnerships cannot now decipher whether they are required to order their business arrangements in accordance with the state law under which they were organized, with the amorphous federal common-law partnership standard authored by the Sixth Circuit, or some combination of both.

The ramifications of this uncertain state of affairs extend far beyond the parties to this litigation. In 1992, there were approximately 1,050,000 partnerships in financial and services industries nationwide, encompassing more than 13.4 million individual partners. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 535 (116th ed. 1996). The Sixth Circuit's decision upsets some of the most fundamental aspects of doing business in the well-established partnership form.

Just one example involves the application of ERISA. The Sixth Circuit endorsed the view that Simpson was not a partner for purposes of ERISA, and thus that he had a cognizable claim that Ernst & Young violated his rights under ERISA by terminating his partnership approximately one year before his partnership retirement benefits would have vested. The practical effect of the Sixth Circuit's decision is not limited to the potential liabilities of partnerships to discharged partners, however. ERISA imposes funding and vesting requirements on businesses for their employees, but those requirements do not apply when no employees are plan participants. If hundreds of thousands of partners are transformed -- or may be transformed -- into employees by virtue of the Sixth Circuit's analysis, it will inevitably be argued that partnerships nationwide may have "huge exposure"

under ERISA for failure adequately to fund their pension obligations for all of their partners. PUB. ACCT. REP. 7 (Nov. 15, 1996) (statement of respondent's attorney); *see also* 29 U.S.C. § 1132 (ERISA civil enforcement provision). Allowing the current state of confusion and uncertainty to continue could increase that potential exposure.

The analysis employed by the Sixth Circuit below also destroys settled practice concerning the taxation of partners and employees. Partnerships routinely determine the logistics of withholding and payroll taxes under federal and state taxation laws in accordance with the distinction between "partners" and "employees" recognized under the state law of the partnership's formation. *See* 26 U.S.C. §§ 3121(d), 3306(i), 3401(c) (requiring employers to pay social security and federal unemployment taxes and to withhold income taxes for their "employees").

The uncertainty spawned by the Sixth Circuit's decision will extend beyond the private sector to already burgeoning federal court dockets. The decision below opens the courtroom door to a new class of litigants -- partners who now will have an incentive to disavow their special status to take advantage of federal statutory protections intended for employees. This unjustified additional burden on the federal judiciary is contrary to the intent of Congress.[4]

---

[4] The Sixth Circuit's approach imposes an unwarranted layer of subjective complexity on the threshold employment-status determination under various federal employment statutes. The Court confirmed earlier this Term that interpreting federal employment statutes in a manner that transforms the "coverage determination into an incredibly complex and expensive factual inquiry" is presumptively contrary to congressional intent. *Walters v. Metropolitan Educ. Enters., Inc.*, ___ U.S. ___ , 117 S. Ct. 660 (1997).

Because the Sixth Circuit's analysis creates great uncertainty in the ordering of business relationships, and has the potential to burden partnerships and the federal courts with a new wave of employment-related litigation, the question presented in this case is one of exceptional importance, and plenary review by this Court is warranted.

II. THE SIXTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS OR WITH DECISIONS OF OTHER FEDERAL APPELLATE COURTS

A. The Sixth Circuit's Decision To Create A Subjective, Multi-Factor Federal Standard For The Existence Of A Bona Fide Partnership Is Irreconcilable With Decisions Of This Court.

The Sixth Circuit ignored decisions of this Court in failing to give state partnership law controlling effect to distinguish partners from employees for purposes of determining coverage under state and federal employment laws. Of course it is true, as both the district court and the Sixth Circuit noted below, that, although the ADEA and ERISA do not define the term "employee," whether an individual is an "employee" with standing to sue under those statutes is a question of federal law. "It does not follow, however, that the content of [the statutory term] must be wholly the product of a federal court's own devising." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991); *see also Burks v. Lasker*, 441 U.S. 471, 477-78 (1979) (existence of federal question does not "make state law irrelevant").

Indeed, this Court has made clear that the opposite is true: unless a uniform rule of decision is needed, or

unless application of the state law in question "'would frustrate specific objectives of the federal programs,'" a federal court must apply state law in interpreting an undefined term in a federal statute. *Kamen*, 500 U.S. at 98 (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)); *see also Barnhill v. Johnson*, 503 U.S. 393 (1992) (applying state law to interpret undefined terms in federal Bankruptcy Code); 28 U.S.C. § 1652 (Rules of Decision Act) (state law shall apply as the rules of decision in civil cases unless the Constitution or treaties of the United States or Acts of Congress dictate otherwise).

This Court has emphasized that the "presumption that state law should be incorporated" to give content to undefined terms in federal statutory schemes "is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98. This is especially true where, as here, the legal relationships at issue are "'creatures of state law.'" *Id.* (citation omitted); *see also De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (determining scope of federal Copyright Act's reference to "children" by incorporation of state law on grounds that familial relationship is "primarily a matter of state concern").

The Sixth Circuit's creation of a new federal common law of partnership is directly contrary to this Court's teaching. In *Kamen*, for example, which involved a shareholder derivative action filed under the federal Investment Company Act (the "ICA"), the Court held that the Seventh Circuit "drew its universal-demand rule from an improper source when it disregarded state law" in defining the contours of statutory terms under the ICA. *Kamen*, 500 U.S. at 100. Similarly, here the Sixth Circuit erred in disregarding New York partnership law in determining

whether Simpson qualified as an "employee" under ERISA or the ADEA.

Incorporating state partnership law to define employment status under ERISA or the ADEA would plainly not frustrate the federal purposes behind those statutes. The decision to displace settled state-law expectations rests with Congress, not with the federal courts. *See, e.g., Atherton v. Federal Deposit Ins. Corp.*, ___ U.S. ___, 117 S. Ct. 666, 670 (1997); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966). Congress has determined not to define the term "employee" in various federal statutes, including ERISA and ADEA. The interest of the United States in providing a private remedy for workplace discrimination does not require creation of uniform federal common law to determine the status of various actors in state-created business entities. *See, e.g., Miree v. DeKalb County*, 433 U.S. 25 (1977) (the fact that the United States has an interest in regulating air travel and promoting air safety did not require application of federal common law).[5] Moreover,

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[5] Judge Daughtrey stated in her concurrence below, that "[o]nly by *statutory modifications* redefining the class of individuals to be protected from such mistreatment can we ensure that hiring, promotion, and firing decisions are undertaken with proper regard for the law of the land." *Simpson*, 100 F.3d at 445-46 (emphasis added). Judge Daughtrey's concurrence implicitly concedes that the Sixth Circuit imposed a judicial gloss on the term "employee" as used by Congress in ERISA and the ADEA because the court believed, as a policy matter, that partners similarly situated to Simpson should fall within the ambit of protections afforded by those statutes. Such policy views should not drive statutory interpretation. Moreover, if the scope of individuals to whom classes of federal statutes apply is to be changed, a legislative amendment would allow businesses and individuals proper notice and opportunity to order their affairs.

"there has been no showing that state law is not adequate to achieve [the federal interests at issue here]." *Wallis*, 384 U.S. at 71.

In fact, the Court's decision earlier this year in *Walters v. Metropolitan Educational Enterprises, Inc.*, suggests that the complex analysis employed by the Sixth Circuit below frustrates the federal purpose underlying various employment statutes. In that case -- which involved the issue of how part-time employees should be counted toward Title VII's fifteen-employee threshold -- Justice Scalia's opinion for a unanimous Court made clear that defining the statutory term "employee" in a manner that would "turn the coverage determination into an incredibly complex and expensive factual inquiry" is disfavored. *Walters*, 117 S. Ct. at 665. The Court reasoned that such a result is "so improbable and so impossible to administer . . . that Congress should be thought to have prescribed it only if the language could bear no other meaning." *Id.* at 664. On that basis, the Court ascribed to the term "employee" its "'ordinary, contemporary, common meaning,'" and endorsed a definition that furthered the certain and efficient administration of the statute. *Id.* at 662 (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 388 (1993)). The decision below -- which abandoned a straightforward approach of relying on state law to determine partnership status in favor of a newly-created subjective federal standard -- is thus at odds with this Court's teaching in *Walters*.

The Sixth Circuit has decided the important federal question presented in a way that conflicts with relevant decisions of this Court. Accordingly, the Court should grant review to alleviate the resulting uncertainty and decide whether settled state law, or judge-made federal common law, should give content to undefined terms

in a federal statute when no uniform rule of decision is warranted.

B. The Sixth Circuit's Analysis Conflicts With Other Federal Appellate Court Decisions.

As amply demonstrated in the petition for certiorari filed by petitioner, the Sixth Circuit's approach to ascertaining whether Simpson qualified as an "employee" under various federal and state statutes is in tension with the decisions of other circuits.[6] The fundamental issue on which the courts of appeals disagree is whether, and to what extent, an entity's choice of organizational form under state law should

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[6] The Eighth Circuit, for example, has acknowledged that "[c]ourts have taken two approaches" toward determining whether partners may be treated as employees for some purposes. *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F. 3d 78, 80 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3632 (U.S. Mar. 7, 1997) (No. 96-1423). Numerous commentators have also noted the split of authority that now exists in the federal courts on this issue. *See, e.g.*, Leigh Pokora, *Partners As Employees Under Title VII: The Saga Continues*, 22 Ohio N.U.L. Rev. 249, 250 (1987) (surveying conflicting analyses applied by federal appellate courts to determine whether partners can qualify as employees under federal discrimination laws); Clifford Scott Sikora, *Statutory Protection For The Discriminatorily-Discharged Partner: Two Recent Decisions*, 13 U. Dayton L. Rev. 311, 328 (1988) (discussing "present split in the federal courts on classification of partners"). *See also* Randall J. Gingiss, *Partners As Common Law Employees*, 28 Ind. L. Rev. 21, 29-31 (1994) (discussing "sharp dichotomy. . .between court decisions in employment discrimination cases and scholarly commentary . . . [with most academics] favor[ing] a broad definition of 'employee' to bring partners within the protection of the employment discrimination statutes. . . . In contrast, the courts have generally been more restrictive.").

determine a partner's status as an employee *vel non* for certain purposes.

The Second Circuit, and at times the Eleventh Circuit, treat as dispositive the voluntary organizational determinations made by business entities and are reluctant to permit individuals to shed a previously-accepted partnership status in order to sue under federal or state law. *See, e.g., EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1538 (2d Cir. 1996) (rejecting invitation to "assess whether . . . owner-director-officers should be treated as partners or employees" based on the individuals' actual role in the company and on "common law" principles rather than "the form of business organization freely chosen and established").

The central tenet of the Second Circuit's approach -- a judicial deference to the incidents of voluntary business organizations duly constituted under state law -- cannot be reconciled with the Sixth Circuit's complete disregard of Ernst & Young's status as a duly-constituted partnership under New York law, as well as Simpson's voluntary decision to avail himself of the benefits and burdens of the Ernst & Young partnership.

Over the years, other federal appellate courts have occasionally held that an entity's legitimate choice of organizational form does not always resolve the inquiry whether a partner can be classified as an employee for certain purposes.[7] Even so, the Sixth Circuit's

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[7] *See, e.g., Devine*, 100 F.3d at 81 (examining "[a]ll relevant factors" to determine partnership status); *Strother v. Southern California Permanente Med. Group*, 79 F.3d 859, 867 (9th Cir. 1996) ("analyz[ing] the true relationship among partners" to determine partnership status); *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir.) (rejecting, based on examination of general characteristics of accounting partnership, attempt by

[Footnote continued on next page]

approach stakes out dramatically new ground in the creation of a novel, multi-faceted and subjective set of federal criteria for determining whether a business organizational form chosen and voluntarily assumed can be disregarded for purposes of assessing the application of various employment statutes. The Sixth Circuit's attempt to fashion a federal common law of partnership is all the more striking because the court's misguided efforts in this regard *did not even mention* New York partnership law, the law of the state in which Ernst & Young established its partnership. The Sixth Circuit's decision thus exacerbates the circuit conflict by embracing a federal common-law test for valid partnership status that impermissibly eliminates from the analysis the state law of the partnership's establishment.

"Of course," as Justice Powell observed more than a decade ago, "an employer may not evade the strictures of [federal employment laws] simply by labeling its employees as 'partners.'" *Hishon v. King & Spalding*, 467 U.S. 69, 79 n.2 (1984) (Powell, J., concurring). But merely calling an employee a partner is a far cry from choosing to establish a partnership pursuant to state law that distinguishes partners from employees, and to incur all the rights and duties that accompany such a designation. Mere subterfuge in labeling is properly and routinely dismissed by federal courts if invoked in an attempt to bypass the requirements of federal and state laws; legitimate and legal business decisions, however, that reflect a chosen form of business organization, to which knowledgeable

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[Footnote continued from previous page]

accounting firm partner to qualify as an employee under ADEA and Title VII), *cert. denied*, 484 U.S. 986 (1987); *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977) (same).

individuals voluntarily accede and by which they benefit, should not lightly be dismissed as "shams."

Thus, the question presented in the petition is important and recurring. Moreover, absent this Court's intervention, the new wave of litigation that will result from the existing confusion among the federal courts on this issue will yield irrational results. It defies both law and logic that Simpson would have been denied the ability to seek redress for his grievances under ERISA and ADEA had he filed his action in the Second Circuit, but that, because Simpson availed himself of a Sixth Circuit forum, his former partners may be saddled with ERISA and ADEA liability. Instead, as with other matters of traditional state-law concern, the substantive law of the state in which a partnership was established should govern regardless of the forum chosen by a plaintiff. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

The court of appeals resolved the question in a manner inconsistent with the teachings of this Court and other federal appellate courts. Review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

May 1, 1997

Respectfully submitted,

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F. There Was No Fiduciary Relationship Between The Management Committee And Simpson

Partners bear a fiduciary relationship to each other. *Auld v. Esteridge*, 86 Misc.2d 895, 382 N.Y.S.2d 897 (Sup. Ct.1976), *aff'd*, 58 A.D.2d 636, 395 N.Y.S.2d 969 (App.Div.), *appeal denied*, 43 N.Y.2d 641, 371 N.E.2d 830 (1977), *citing Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928) (Cardozo, J.). *See also* N.Y. PARTNERSHIP LAW § 43 (McKinney 1988). The main elements of fiduciary duty are the utmost good faith, the highest fidelity, fairness, and loyalty. *Newberger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057 (S.D.N.Y. 1977), *cert. denied*, 434 U.S. 1035 (1978); *In re Grace's Will*, 61 Misc.2d 1064, 308 N.Y.S.2d 136 (Sup. Ct. 1970). Ernst & Young's refusal to permit Simpson to examine books and records regarding UBTs and to obtain its attorney's opinion regarding Simpson's discharge demonstrate an absence of a fiduciary relationship between the Management Committee and Simpson.

The Management Committee's act, at the time of the merger, of privately planning to "lay-off" Parties, while at the same time assuring them good increases in 1990 and 1991, equal or better benefits, and no reduction in partners (Pl. Ex. 69, pp. 3, 5, 36; Doc. 144, p. 289), is a vivid example of the absence of a fiduciary relationship. Simpson's discharge and that of 126 other Parties was done for two stated economic reasons: 1) to protect the continued profit of firm members who were not discharged; and 2) to encourage recruitment and retention of younger accountants, who were generally paid less, were farther away from retirement, and needed assurance they would rise to partnership status. (Doc. 144, pp. 262, 266). The failure of Ernst & Young to choose other options, such as not admitting as many new accountants, or reducing Parties' compensation, belies its contention that Simpson was a bona fide partner to whom the Management Committee owed a fiduciary duty. Since bona fide partners share in profits and losses proportionately, N.Y. PARTNERSHIP LAW §§ 26, 40(1), a reduction in all Parties' compensation would have been consistent with the existence of a fiduciary relationship. "Layoff" of Parties to preserve other Parties income is not. The fact that the Management Committee was simultaneously considering hiring

accountants and terminating Parties is also indicative of the absence of a fiduciary relationship.

There is a degree of permanence associated with the status of partner that is absent from the status of employee. *See Wheeler*, 825 F.2d at 274. The element of co-ownership of the firm and consequent fiduciary relationship and employment security inherent therein is absent when some Parties can be discharged, without any voice in the matter, in order to insure the financial gain of other Parties.

G. The Firm Did Not Actually Consider Simpson A Co-Owner

We are not persuaded by Ernst & Young's contention that Simpson delegated certain management responsibilities. We acknowledge that the N.Y. PARTNERSHIP LAW, § 40(5), permits delegation of such duties, and we agree that the larger the partnership, the more delegation is to be expected. *See Wheeler*, 825 F.2d at 273. Simpson, however, could not delegate rights he never possessed. Furthermore, at some point, delegation destroys partner status. While it may have been "normal business caution" to prevent Simpson from binding the firm to promissory notes by his signature and from pledging firm assets, or to require reviews of certain audits or the engagement of new clients, it was not "normal business caution" to prevent him from voting on substantive matters, to deny him a proportionate share of firm profits, to eliminate his share in the firm's accounts receivable, to deny him personnel authority, to prevent him from examining the firm's books, and to prevent him from learning what legal advice the firm's attorneys provided.

H. Simpson Agreed To Unlimited Liability For Partnership Losses

The U.S. Agreement and the Partnership Agreement provide that Simpson was jointly and individually liable for the losses of Ernst & Young U.S. and Ernst & Young respectively. On its face, this is a characteristic of partnership. It certainly cannot, however, be considered a benefit of partnership. Furthermore, there is no evidence that Simpson or any other Party was ever called upon to accept responsibility for losses of Ernst & Young U.S. or Ernst & Young. We question the enforceability of this provision in light of

the apparent lack of consideration therefor. It seems inequitable to hold an individual liable for the losses of his "partners" when that individual has no choice in determining who his partners are, no power to control the risks his "partners" take, and no right to examine the firm's books to determine what his liabilities might be. With these qualifications, Simpson's unlimited liability is a partnership attribute.

I. Simpson Was Not A Bona Fide Partner; He Was An Ernst & Young Employee

Although Simpson was termed an Ernst & Young partner, he had no financial investment in, and received no compensation from that entity. Simpson loaned $84,000 to Ernst & Young U.S. and received a salary and bonus from that entity. Ernst & Young U.S., however, did not refer to Simpson as a partner, but rather as a "Party." While labeling a person "partner" does not make him so, the failure to term Simpson a partner, when he had been thus denominated at Arthur Young, is an indication that he was not intended to be a partner. Simpson lacked any meaningful control and voting rights in Ernst & Young U.S., did not share in the firm's profits and losses, did not enjoy a fiduciary relationship with the Management Committee members, and had no other ownership rights therein.

In view of all the factors analyzed *supra*, pp. 21-30, with no one factor being dispositive, we find, under a traditional partnership law analysis, that Simpson has many qualitative characteristics of an employee and few, if any, attributes of a bona fide partner. Therefore, we find Simpson was an employee protected against age discrimination under ADEA.

In addition to our finding being directed by traditional legal principles, it is also an equitable result, putting Simpson on par with other business executives and professionals who have held positions of greater responsibility in their firms than Simpson and who were found to be protected by ADEA. *See, for example, Hawley v. Dresser Industries, Inc.*, 958 F.2d 720 (6th Cir. 1992); *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2d Cir. 1986); *Gorman v. North Pittsburgh Oral Surgery Associates, Ltd.*, 664 F.Supp. 212 (W.D. Pa. 1987). Particularly instructive in this regard is *Barnhart v. Pickrel, Schaeffer &*

Ebeling, Co., L.P.A., 12 F.3d 1382 (6th Cir. 1993), decided in this District, and affirmed by the Sixth Circuit. Barnhart, an "executive attorney" and shareholder in a law firm, was in charge of the firm's litigation department and had been a senior partner until the firm changed from a partnership to a professional corporation.[5] The District Court's decision that *Barnhart* was an employee under ADEA (*Barnhart*, No. C-3-90-330 (S.D. Ohio) (Bertelsman, J.)) was undisturbed on appeal to the Sixth Circuit.

J. It Is Not Necessary To Resolve Simpson's Contention That Ernst & Young Is Not Actually A Partnership

Simpson also contends that both the U.S. Agreement and the Partnership Agreement fail to establish bona fide partnerships; therefore, he is not a partner. Simpson has presented substantial evidence in this regard, much of which has been discussed above. Simpson contends that the Partnership Agreement has no specific provision regarding the distribution of earnings; it does not result in the establishment of a capital account; it provides no voting procedure for the election of the Chairman or Management Committee; and it specifically restricts the rights of the Partners to sign promissory notes or to examine the firm's books. With regard to the U.S. Agreement, Simpson contends that it has been carefully

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[5] As a shareholder, Barnhart was entitled to vote his capital stock regarding the election and termination of officers, dissolution of the firm, amendments to the firm's code of regulations, and the employment and termination of other attorneys in the firm. (*Barnhart*, No. C-3-90-330, Defendants' Motion For Summary Judgment, p. 18). The District Court decided the preliminary jurisdictional issue in plaintiff's favor, finding his position to be more akin to that of an employee than an employer or partner. (Id., Opinion and Order filed May 26, 1992, p. 4). The Court granted the firm's motion for summary judgment on the merits of the age discrimination claim, and Barnhart appealed. The issue whether Barnhart was an owner or employee was not directly before the Sixth Circuit, because the firm did not cross appeal. The issue was discussed, however, in Barnhart's appellate brief. (*See* Doc. 163, p. 35). Since the issue is jurisdictional in nature, the Sixth Circuit implicitly affirmed the District Court's decision that Barnhart was an employee by finding that he established a prima facie case. Barnhart possessed far more indicia of an employer than Simpson.

crafted to avoid creating a partnership because it includes non-CPAs as parties and state laws prohibit CPAs and non-CPAs from representing themselves as partners. The fact that we have found Simpson to be an employee does not, in and of itself, justify the conclusion that Ernst & Young and Ernst & Young U.S. are not partnerships.[6] Because we have resolved the jurisdictional issue by finding Simpson to be an employee, it is not necessary to go further to decide whether either the entities Ernst & Young or Ernst & Young U.S. are in actuality partnerships.

IV. Because Simpson Was An Employee, He Is Subject To The Protection Afforded Under O.R.C. § 4101.17(B)

Ohio's counterpart to the ADEA, O.R.C. § 4101.17(B), which prevents age discrimination against "any employee," is interpreted in accordance with ADEA. *See Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir. 1988), *appeal after remand*, 914 F.2d 258 (6th Cir. 1990). In view of the above, Simpson's age discrimination claim under the Ohio statute also withstands Ernst & Young's motion for summary judgment.

V. As An Employee, Simpson Was Subject To ERISA

There exist four retirement plans in which Simpson may be eligible for benefits: 1) a retirement plan described in the U.S. Agreement, Section 12; 2) a H.R. 10 Plan (Keough Plan); 3) UBT rights in accordance with his Arthur Young position; and 4) a Defined Benefit Retirement Plan (also known as the "five year qualified plan"). Ernst & Young concedes that the latter includes both partners and non-partners and, therefore, is an ERISA retirement plan. (Doc. 166, p. 29).

ERISA does not apply to retirement plans which cover only partners. 29 C.F.R. § 2510.3-3(b) and (c)(2). *See also Robertson v. Alexander Grant & Co.*, 798 F.2d 868, 871 (5th Cir. 1986), *cert. denied*, 479 U.S. 1089 (1987). Ernst & Young contends that the three remaining retirement plans at issue involve only partners;

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[6] Although we do not answer the question, it is possible that the Management Committee constitutes a partnership, with the remaining Parties being employees of the partnership. It is also possible that Ernst & Young or Ernst & Young U.S. are non-partnership business associations.

therefore, they are not subject to ERISA. Simpson contends that he is an employee; therefore, the plans are subject to ERISA. Under *Darden*, a traditional legal test should be applied in determining whether an individual is an employee under ERISA. Our finding above that Simpson is an employee and not a partner means he is also subject to ERISA protection.[7]

CONCLUSION

Simpson had few, if any, meaningful attributes of a partner. For all practical purposes, he was an employee with the additional detriment of having promised to be liable for the firm's losses. Ernst & Young was free to draft its Partnership Agreement and U.S. Agreement in such a way as to generate the belief in its employees that they enjoyed partnership status and to permit them to represent themselves as partners. However, because these individuals actually had no bona fide ownership interest, no fiduciary relationship, no share in the profits and losses, no significant management control, no meaningful voting rights, no meaningful vote in firm decisions, and no job security, they were not bona fide partners. Therefore, Ernst & Young was obligated not to discriminate against them because of their age, sex, race, religion, national origin, or handicap.

IT IS THEREFORE ORDERED THAT:

1) Ernst & Young's motion for summary judgment is DENIED; and

2) Simpson's motion for partial summary judgment is GRANTED.

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[7] The retirement plan embodied in the U.S. Agreement includes CPAs and non-CPAs. The latter do not bear joint and individual liability for firm losses. Ernst & Young's position has always been that joint and individual liability is an "essential" indicia of partner status. The inclusion of the non-CPAs in this plan is further evidence that it is within the ambit of ERISA. *See Robertson*, 798 F.2d at 871-72.

3) The case shall proceed to jury trial on Simpson's federal and state age discrimination claims and to bench trial on his ERISA claims.

Date: 4-21-94

/s/
Robert A. Steinberg
United States Magistrate Judge

APPENDIX D

Case No. C-1-91-196

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

P. LARUE SIMPSON, Plaintiff

vs

ERNST & YOUNG, Defendant

Filed September 23, 1994

ORDER

This case is before the Court on Plaintiff P. LaRue Simpson's Employment Retirement Income Security Act (ERISA) claim, following arguments thereon and post-hearing pleadings. (Docs. 242, 245, 246, 253). We also consider evidence presented during the jury trial on Simpson's Age Discrimination in Employment Act (ADEA) claim against Ernst & Young, which resulted in a verdict in Simpson's favor. The parties unanimously consented to entry of final judgment by the United States Magistrate Judge.

Simpson contends that Ernst & Young discharged him in retaliation for his requests regarding retirement plan benefits. He also contends that Ernst & Young discharged him with intent to interfere with the attainment of his retirement rights, in order to avoid its obligation to pay retirement benefits to him. Simpson seeks lost retirement benefits; compensatory damages, including back pay, front pay, and emotional distress damages; punitive damages; and attorney's fees and expenses. He also seeks statutory relief of $100 a day for Ernst & Young's failure to provide him with requested pension information.

FINDINGS OF FACT

1. Defendant Ernst & Young is a large accounting firm created in October 1989 by the merger of the Ernst & Whinney and Arthur Young accounting firms. Plaintiff Simpson, a Certified Public Accountant (CPA), was born on September 27, 1943. Prior to his relationship with Ernst & Young, Simpson worked for Arthur Young's Cincinnati, Ohio office from December 1986 to the merger on October 1, 1989. He was Cincinnati Managing Partner from 1987 to 1989. From October 1972 to December 1986, Simpson worked for KMG/Main Hurdman (KMG/MH), an accounting firm Arthur Young acquired in 1986. He was Managing Partner of KMG/MH's Denver and Cincinnati offices from 1981 to 1986.

2. In June 1989, Arthur Young distributed to its partners a Merger Agreement and an Information Document For Partners. The Information Document represented that the worldwide combination of Arthur Young and Ernst & Whinney would result in the largest and strongest international professional services firm in the world. The two firms were described as compatible because, among other things, they "care for individuals by promoting and recognizing them based on performance" and have "mutual respect among partners." Both were estimated to have good increases in their 1990 and 1991 cash earnings, despite merger costs. The Information Document represented that Arthur Young partners would receive equal or better benefits under the Ernst & Young retirement plan. They represented to their partners and the public that the merger was not expected to result in a reduction in partners.

3. On October 1, 1989, the merger was effected. The merged firm organized itself into two entities: Ernst & Young and Ernst & Young U.S. The Ernst & Young Partnership Agreement (Partnership Agreement) required the signatories, who are termed "Partners," to be CPAs and to sign a second agreement, the Ernst & Young U.S. Partnership Agreement (U.S. Agreement). The signatories to the U.S. Agreement were not termed "Partners," but were denominated "Parties" and consisted of individuals who were both CPAs and non-CPAs. The CPAs were referred to as "Capital Account Parties," and the non-CPAs were termed "Investment Account Parties."

4. Both Ernst & Whinney and Arthur Young maintained Cincinnati offices before the merger. Gerald Hill was Ernst & Whinney's Cincinnati Managing Partner. Simpson was Arthur Young's Cincinnati Managing Partner. Following the merger, Ernst & Young named Hill Cincinnati Managing Partner. Simpson was named Cincinnati Director of Entrepreneurial Services, a lesser position.

5. A Management Committee, consisting of ten to fourteen Parties and a Chairman, was responsible for the management of Ernst & Young U.S. and Ernst & Young. Its responsibilities included addition or discharge of Parties, decisions on mergers and acquisitions, allocation of earnings among the Parties, and appointment or removal of the Chairman. The Management Committee also had many responsibilities and duties regarding the retirement plan described in the U.S. Agreement, Section 12 (Ernst & Young Plan).

6. The original members of the Management Committee included Jesse Miles, who was also Chairman, John Schornack, and James Boland.

7. Simpson was covered by four Ernst & Young retirement plans: 1) the Ernst & Young Plan, 2) the Defined Benefit Plan, 3) the Retirement Savings Plan, and 4) the UBT Account.

8. The Defined Benefit Plan and the Retirement Savings Plan each had a five year vesting requirement.

9. The Ernst & Young Plan, embodied in Section 12 of the U.S. Agreement, has age and years of service vesting requirements. Vesting does not occur until the participant reaches age 53. If the participant retires at an age less than 58, he needs either 15 years as a partner or 20 years with the firm to vest. If the participant retires at age 58 or thereafter, there is no years of service requirement. There is a 4% reduction of benefits for each year of service with the firm under 25 years. The amount paid to a retiree under the Ernst & Young Plan is offset by the retiree's benefits under the Defined Benefit and Retirement Savings Plans.

10. The UBT[1] Account is available only to previous partners[2] of Arthur Young, including Simpson. Before the merger, Arthur Young partners had a right to this money as a part of their retirement package, which was to be paid to them over an eight year period following withdrawal or retirement from the firm. Before the merger, UBT Accounts accrued interest over time. As a term of the merger, the UBT Accounts were carried over to Ernst & Young and the UBT Account values were frozen as of September 30, 1989.

11. Each former Arthur Young partner, including Simpson, was allowed to elect retirement under the plan Arthur Young had in place before the merger (Arthur Young Plan), with a frozen UBT Account value, or under the Ernst & Young Plan, with forfeiture of the UBT Account.

12. If Simpson had remained employed at Ernst & Young and retired at age 60 in 2003, he would have had 17 years of service with Arthur Young and Ernst & Young. Due to the 4% reduction of service factor for each year with the firm under 25 years, he would have then vested 68% in the Ernst & Young Plan.

13. On September 27, 1989, Simpson, on behalf of himself and Ernst & Young partners Jerry Hindman and Donald Fritz, wrote to Management Committee Member Schornack, with copies to Management Committee Member Boland and Cincinnati Managing Partner Gerald Hill, requesting years of service credit for their prior service with KMG/MH. Simpson's concerns were: 1) under the Ernst & Young Plan, he would not be fully vested at retirement due to the years of service requirement and service reduction factor; and 2) he was losing his UBT Account's accruing benefits.

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[1] UBT is an acronym for unbilled time and uncollected fees. It is an account receivable. Newly admitted Arthur Young partners purchased UBTs over an eight year period following their admission as partners.

[2] We do not draw a legal conclusion that Simpson was an Arthur Young partner. That issue and the facts relating to it were not before the Court. We accept the term as one used by the parties.

14. Schornack responded to Simpson on October 30, 1989, with copies to Boland and Hill, that Simpson, Hindman, and Fritz would not be given credit for their prior service with KMG/MH. Schornack also stated that he did not understand the basis of Simpson's concern that he could not become 100% vested under the Ernst & Young Plan.

15. On November 8, 1989, Simpson again wrote Schornack, with copies to Boland and Hill, "to clarify what we believe to be inequities existing in our pensions due to the merger with [Ernst & Whinney]." Simpson requested a calculation of his retirement benefits as a future Ernst & Young retiree, including UBT Account values, and a calculation of what his retirement benefits would have been under the Arthur Young Plan, including UBT Account values. He asked for the vesting requirements of both plans. Simpson's concern was made clear in the closing paragraph: "For me to spend 27 years as a partner and not receive 100% retirement benefits just is not fair."

16. On November 28, 1989, Simpson wrote Boland, with copies to Schornack and Hill, enclosing calculations showing that at certain earning levels he would receive less under the Ernst & Young Plan than he would have received under the Arthur Young Plan.

17. On December 12, 1989, Schornack presented Simpson's prior correspondence to Management Committee Chairman Miles for his consideration.

18. On December 20, 1989, Simpson communicated directly to Miles on this issue.

19. On December 28, 1989, Miles responded to Schornack, with a copy to Simpson, stating that he did not understand some of Simpson's comments and that Simpson did not understand the retirement plan details. Miles calculated the Ernst & Young Plan vesting percentages of Hindman and Fritz upon retirement at age 60 to be 88% and 100% respectively. Miles did not calculate Simpson's vesting percentage at age 60. He noted that Simpson would vest in the Defined Benefit and Retirement Savings Plans if he remained with the firm until December 1991. Miles' letter concludes:

> After writing this epistle it is fairly clear we are dealing with complex matters that are difficult to understand without investing substantial time. If you wish I will subject myself to interrogation by LaRue and do my best to explain how all the plans work, including UBT. (I really do not wish to write further on this subject, however.)

20. On January 11, 1990, Simpson again wrote Schornack on this issue, with copies to Miles, Boland, and Hill.

21. On February 7, 1990, Schornack issued a terse response to Simpson, with copies to Boland and Hill, that the letter he received from Miles was the "final word" and that he should "call it a day" on the subject.

22. Simpson was the only employee who contacted Miles regarding this issue.

23. At the time of the merger, an actuarial analysis of the present value of the merged firms' retirement benefit plans showed that accumulated future pension benefit obligations were $290,000,000 higher than the funding available. This shortfall, if and when it became due in the future, would have to be paid from the firm's current earnings. Standard accounting practices required Ernst & Young to footnote the shortfall amount in its financial reports.

24. Despite its pre-merger representations that the merger was not expected to result in a reduction in partners, the Management Committee concluded that a substantial number of partners would have to be discharged. An October 5, 1989 memorandum from Ernst & Young's first Management Committee meeting stated "excess professional staff capacity to be about 8%" and the "Plan is to act on 5% excess by November 15 . . . ."

25. Beginning in late 1989 and continuing to early 1990, the Management Committee adopted a process of resignations and retirements to reduce the number of partners in order to protect the firm from a substantial reduction in profits. Management Committee Chairman Miles characterized this process as a "lay off." The specific date this process was adopted is not documented in the record.

26. The December 18, 1989 Management Committee meeting agenda included items entitled "Partner movement and retention" and "1990 Partner Admissions." "Partner movement" meant discharging as well as retiring partners. The agenda included a list of former Arthur Young partners by age, showing the total number of years with Arthur Young, the total number of years as a partner, and any break in service. The agenda also included a list of former Ernst & Whinney partners by age, showing the total number of years with Ernst & Whinney and the total number of years as a partner. These are items considered in determining whether an individual has worked the years necessary to vest in a retirement plan.

27. The February 21, 1990 Management Committee agenda itemized "Partner resignations and retirements" as well as the "1990 Partner recommendation process." Regarding the former, the agenda included a table entitled "Comparison of Partner Ages in Fiscal 1990," which grouped firm members by age.

28. The Management Committee had the right to request Simpson to terminate his relationship with Ernst & Young U.S. by giving him six months written notice. Simpson had no right to appeal his discharge or the discharge of any other firm member.

29. In May 1990, Ernst & Young U.S. requested Simpson's resignation. There are no contemporaneous Management Committee minutes or other documentation setting forth either the date of or the reason for this decision. Nor was any credible evidence presented establishing either the specific date the Management Committee decided to discharge Simpson[3] or a legitimate reason therefor. Simpson refused to resign. On June 19, 1990, he was given written notification that he was discharged effective December 19, 1990.

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[3] Ernst & Young, through Boland's testimony, alleges that the discharge decision was made in April 1990. As explained *infra*, pp. 22-23, we find that testimony not credible. Boland testified during his deposition that he could not recall the discharge decision date (Doc. 218, p. 1716-17), and Ernst & Young presented no documentary evidence showing the decision date.

30. As of the effective date of his discharge, Simpson was 46 years old. At that time, he had not vested in the Defined Benefit Plan, the Retirement Savings Plan, or the Ernst & Young Plan. Simpson would have vested in the Defined Benefit Plan and Retirement Savings Plan in December 1991. Simpson would have vested in the Ernst & Young Plan when he reached age 58 and had 15 years of service in December 2001.

31. When the Management Committee voted to discharge Simpson, they were aware of Simpson's retirement vesting dates.

32. The money that would have been paid to Simpson had he vested in the Defined Benefit, Retirement Savings, and Ernst & Young Plans remained in those plans, inuring to the benefit of those not discharged.

33. Neither Hindman nor Fritz were discharged.

34. During the period October 1, 1989 through March 25, 1991, Ernst & Young U.S. discharged 120 older partners while admitting 162 younger partners. The mean age of the partners discharged was 44.80. The mean age of the partners admitted was 37.50. The mean salary of the partners discharged was $174,443. The mean salary of the partners admitted was $128,741. The discharge of the older partners and admission of younger partners reduced Ernst & Young annual salary obligations by $5,484,240. It also substantially reduced the firm's shortfall in future pension benefits obligations, which where based on salary rates. Under the Ernst & Young Plan, retirement benefits were based on the retiree's three highest years salary.

35. Simpson's 1990 salary was $194,092.

36. Simpson was replaced by Fritz, a younger person with a lower salary.

37. 10.8% of the discharged partners were not vested in the Defined Benefit or Retirement Savings Plans.

38. A substantial majority of the discharged partners were not vested in the Ernst & Young Plan.[4]

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[4] Ernst & Young contends 89% of the discharged partners were not vested in the Ernst & Young Plan; Simpson contends the figure is 96.69%. Ernst & Young's figure is not verifiable. Simpson's figure is

39. The Management Committee voted to discharge Simpson in part because of his retirement inquiries and to reduce the firm's $290,000,000 shortfall in future pension benefits obligations.

40. Upon his discharge in December 1990, Ernst & Young advised Simpson that he would be paid $61,047 as reflected on a Statement of Accounts and $47,594 from the UBT Account, the latter to be paid out over an eight year period. Ernst & Young advised Simpson that this calculation was binding on the parties. In March 1993, however, Ernst & Young told Simpson that it had made an error in calculating the $61,047 amount and would withhold $10,425 from Simpson's future UBT Account payments.

41. Because of Ernst & Young's actions, Simpson lost $421,747 in past retirement benefits and $290,782 in future retirement benefits.[5]

CONCLUSIONS OF LAW

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 et seq., is a comprehensive statute designed to protect employees and their beneficiaries regarding employee benefit plans. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990), *citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). In promulgating ERISA, Congress intended to cure several specific problems: 1) employees with long years of employment were losing anticipated retirement benefits due to lack of vesting; 2) the soundness and stability of benefit plans were endangered by inadequate funding; and 3) employees and beneficiaries were being deprived of anticipated benefits due to termination of plans before the accumulation of sufficient funds. 29 U.S.C. § 1001(a).

ERISA imposes participation, funding, and vesting requirements upon pension plans. *Ingersoll-Rand*, 498 U.S. at 137.

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mathematically incorrect.

[5] In its verdict on Simpson's age discrimination claim, the jury found he had lost $421,747 in past retirement benefits and $290,782 in future retirement benefits. Ernst & Young did not challenge this determination in its briefs on the ERISA issues. The jury's findings are supported by the evidence, including the testimony of plaintiff's expert, Harvey Rosen.

It also sets forth uniform standards, including rules for reporting, disclosure, and fiduciary responsibility for both pension and welfare plans. Id. The statute provides for criminal penalties and civil enforcement. 29 U.S.C. §§ 1131, 1132.

Congress expressly included a broad preemption clause in ERISA, wherein it supersedes "... any and all state laws insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. § 1144. The preemption clause is deliberately expansive, so that pension plan regulation is an exclusive federal concern. *Ingersoll-Rand*, 498 U.S. at 138, *citing Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 46 (1987).

As part of ERISA, Congress enacted 29 U.S.C. § 1140, which prohibits the discharge of "a participant ... for exercising any right to which he is entitled under the provisions of an employee benefit plan, [or] this subchapter," or "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or] this subchapter...."

Congress enacted § 1140 primarily to prevent unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining retirement benefits. *West v. Butler*, 621 F.2d 240, 245 (6th Cir.1980). Congress viewed this as an integral part of ERISA because without it, employers would be free to circumvent the provision of promised benefits. *Ingersoll-Rand*, 498 U.S. at 143. However, ERISA does not guarantee every employee a job until he or she has fully vested in his or her pension plan. *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988).

To prove a *prima facie* case under § 1140, the plaintiff must show by a preponderance of the evidence: 1) prohibited employer conduct, 2) taken for the purpose of interfering, 3) with the attainment of any right to which the employee may become entitled. *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992). To satisfy the second element, plaintiff must show that the employer had a specific intent to engage in the proscribed activity. Id. Proof of specific intent may be shown by direct evidence or, more often, by circumstantial evidence. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987). The plaintiff is not required to show that the employer's

sole purpose in discharging him was to interfere with his pension benefits, but that it was a motivating factor in the decision. *Humphreys*, 966 F.2d at 1043. The loss of benefits incidental to a legitimate discharge does not constitute an ERISA violation. *Gavalik*, 812 F.2d at 851. Otherwise, any action by an employer that resulted in an economic savings would be suspect since pension rights are a substantial component of any employer's economic situation. *Humphreys*, 966 F.2d at 1044.

To prove a *prima facie* retaliation case under § 1140, the plaintiff must show by a preponderance of the evidence 1) that he engaged in activity protected under ERISA; 2) that he was the subject of an adverse employment action; and 3) that there is a causal link between the employee's protected activity and the employer's adverse action. *See Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir.1992); *Cooper v. City of North Olmsted*, 795 F.2d 1265 (6th Cir.1986).

If the plaintiff proves a *prima facie* case, it is then the employer's burden to introduce evidence of a legitimate, nondiscriminatory reason for its challenged action. *Humphreys*, 966 F.2d at 1043. If the employer successfully asserts a legitimate reason for the plaintiff's discharge, then the plaintiff must prove that interference with pension benefits was a motivating factor in the employer's discharge decision, the burden of persuasion always being borne by the plaintiff. *See St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2749 (1993).

If the plaintiff shows that the employer's proffered reasons are pretextual, the plaintiff must still prove that interference with pension benefits and/or retaliation for protected ERISA activity was a motivating factor in the discharge decision. *See* id. at 2749-50. The factfinder's disbelief of the employer's proffered reasons, particularly if disbelief is accompanied by evidence of mendacity, may, together with the elements of a *prima facie* case, suffice to permit an inference of intentional interference with pension benefits and/or retaliation. *See* id. at 2749; *Manzer v. Diamond Shamrock Chemicals Co.*, No. 93-5513 1994 WL 374789 (6th Cir. July 20, 1994) (to be reprinted at 29 F.3d 1078). To refute the employer's proffered reasons, the plaintiff may show by a preponderance of the evidence either: 1) that the proffered reasons had no basis in fact; 2) that the proffered reasons did not actually motivate his

discharge; or 3) that the proffered reasons were insufficient to motivate his discharge. *See Manzer*, 1994 WL 374789.

I. The Ernst & Young Retirement Plans Are Covered By ERISA

Ernst & Young has conceded that the Defined Benefit Plan is an ERISA plan. (Doc. 166, p. 29). Ernst & Young contends that the Retirement Savings Plan, the Ernst & Young Plan, and the UBT Account are not covered by ERISA. It also contends that the Ernst & Young Plan is a "top hat" plan and therefore is exempt from ERISA.

A retirement or pension plan covered by ERISA is:

> any plan, fund, or program ... established or maintained by an employer ... to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program — (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits under the plan.

29 U.S.C. § 1002(2)(a).

An ERISA pension plan must include employees:

> The term 'employee benefit plan' shall not include any plan, fund or program ... under which no employees are participants.... For example, a so-called 'Keogh' or 'HR-10' plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees, in addition to self-employed individuals, are participants covered under the plan, will be covered by Title I.

29 C.F.R. § 2510.3-3(b).

The definition of an ERISA pension plan is intentionally broad and is in keeping with Congress's intent to establish pension plan regulation as an exclusive federal concern. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

One purpose of ERISA is to correct abuses occurring in the management of pension plans held in trust for workers. *Robertson v. Alexander Grant & Co.*, 798 F.2d 868, 870 (5th Cir. 1986), *cert. denied*, 479 U.S. 1089 (1987), *citing* S.Rep. No. 127, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4838-44 *and* H. Rep. No. 533, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4639-43. Employees in such relationships are more vulnerable to abuses than genuine partners because employees typically lack control over pension plan management and power to decide whether to extend pension benefits to certain employees. Id. In contrast, a genuine partner has more control and decision-making power because of his right to vote in partnership affairs. Id. The true partnership arrangement also has a self-policing feature whereby partners have an incentive not to agree to provisions that may harm certain members of the partnership because each partner knows that he could ultimately be the harmed partner. Id. On the other hand, the employer is motivated to earn profits for himself or the shareholders and has less incentive to treat his employees as fairly as a partner would treat other partners. Id. Because of this difference between true partnership arrangements and employer-employee relationships, Congress intended to regulate and protect only the latter. Id.; *Schwartz v. Gordon*, 761 F.2d 864, 867-69 (2d Cir. 1985). The administrative regulation exempting Keogh plans from ERISA furthers Congress's intent. Self-employed persons, unlike employees, have complete control over the amount, investment, and form of the retirement fund and do not need ERISA protection. *Schwartz*, 761 F.2d at 868.

Earlier in this case, Ernst & Young contended that the three retirement plans at issue were not subject to ERISA because they covered only partners. In an earlier opinion, we found that Simpson was an employee rather than a genuine partner, thus rejecting that contention. We relied upon *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344 (1992), which indicates that traditional legal concepts are the criteria for determining whether an individual is an employee for ERISA purposes. We found that under traditional employee and partnership law concepts, Simpson and other similarly situated "partners" were actually employees. (Doc.

188). Thus, the pension plans in question do cover employees, even though they denominate them partners.

There are two elements to an ERISA pension plan. It must: 1) be established or maintained by the employer for the benefit of its employees; and 2) provide retirement income for employees or result in income deferral payable by employees upon termination of the employment relationship. 29 U.S.C. § 1002(2)(a).

There is no dispute that Ernst & Young established the Retirement Savings Plan and the Ernst & Young Plan. Although Arthur Young established the UBT Account, the right to receive money from that fund after the merger was enforceable against Ernst & Young. Thus, Ernst & Young maintained the UBT Account. By their express terms, the Retirement Savings Plan and the Ernst & Young Plan provide for retirement income. *See Commercial Mortgage Insurance Inc. v. Citizens National Bank of Dallas*, 526 F.Supp. 510 (N.D. Tex. 1981). The UBT Account results in a deferral of Arthur Young income for a period extending to the termination of the employment relationship. *See* 29 U.S.C. § 1002(2)(A)(ii). Therefore, the Retirement Savings Plan, the Ernst & Young Plan, and the UBT Account are ERISA pension plans. 29 U.S.C. § 1002(2)(a).

Affording Simpson ERISA protection is in keeping with ERISA's purpose to protect the employee who is vulnerable to management abuses regarding his retirement funds. *See Robertson*, 798 F.2d at 870. Simpson lacked any meaningful control and voting rights in Ernst & Young and was thus unable to protect himself against Management Committee decisions regarding his retirement benefits. (Doc. 188, p. 32). Concern that his retirement benefits were being substantially reduced because of the merger and Management Committee decisions as to the new retirement arrangement's terms motivated Simpson's letters. Ernst & Young defended its actions as economically necessary, contending that certain partners had to be discharged in order to maintain the financial status quo of those remaining, thereby evidencing its posture as one of an employer rather than a partnership. Such actions are precisely the reason for ERISA protection of employees. Simpson was an individual Congress specifically intended to protect under ERISA: he had long years of

service but was losing anticipated benefits due to lack of vesting. *See* 29 U.S.C. § 1001(a).[6]

Ernst & Young contends that the Retirement Savings Plan is exempt from ERISA coverage because it is a Keogh plan. In our earlier opinion, we referred to the Retirement Savings Plan as "a H.R. 10 Plan (Keogh Plan)" because this was the name used by the parties for this plan. *See, e.g.*, Doc. 163, p. 38. Our previous acceptance of this label does not preclude our present finding that the Keogh exception does not apply to Simpson regarding the Retirement Savings Plan. Keogh plans are intended to cover self-employed individuals and owner-employees. 26 U.S.C. § 401(c). A Keogh plan, however, may cover both partners and employees. Where it does, only the latter receives ERISA protection. 29 C.F.R. § 2510.3-3(b); *see Fugarino v. Hartford Life and Accident Insurance Co.*, 969 F.2d 178, 186 (6th Cir.1992), *cert. denied*, 113 S.Ct. 1401 (1993). For the reasons expressed in our earlier opinion finding Simpson to be an employee (Doc. 188), the Retirement Savings Plan is not exempt from ERISA coverage.

Ernst & Young also contends that the Ernst & Young Plan is a "top hat" plan, exempt from ERISA's vesting, funding, and fiduciary responsibility provisions. Therefore, Simpson "obtains no greater rights than those under the terms of [the Ernst & Young Plan]." (Doc. 246, p. 5).

ERISA Part 2, entitled Participation and Vesting (29 U.S.C. §§ 1051 to 1061), ERISA Part 3, entitled Funding (29 U.S.C. §§ 1081 to 1086), and ERISA Part 4, entitled Fiduciary Responsibility (29 U.S.C. §§ 1101 to 1114) do not apply to pension plans maintained "primarily ... for a select group of management or highly compensated employees." 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). To qualify as a "top hat" plan, there must be a significant disparity between the average compensation of the top hat group and the average compensation of all other employees. *Belka v. Rowe Furniture Corp.*, 571 F.Supp. 1249 (D. Md. 1983).

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[6] Simpson did not voluntarily jump from employer to employer; he was a steady worker who was employed at three different accounting firms because of acquisitions and mergers of the firms.

Although Simpson's 1990 salary was $194,092, this alone does not mean he was highly compensated when compared to the average compensation of Ernst & Young employees. In an earlier proceeding in this case, Miles testified that his 1990 salary was $580,000, almost three times Simpson's salary. (Doc. 144, p. 292). Some partners in the firm received salaries approaching $800,000. (Doc. 207, p. 1073). Although Simpson was a CPA, he was not an office manager. Many parties covered by the Ernst & Young Plan were non-managerial CPAs, serving an audit function. Since no evidence was presented as to the average compensation of all employees covered by the Ernst & Young Plan, it is not possible to tell whether they were all highly compensated employees. *See Belka*, 571 F.Supp. at 1252-53. Thus, we find that the Ernst & Young Plan does not fall into the "top hat" exemption. Assuming, *arguendo*, that it is a "top hat" plan, it would not be exempt from Part 5, entitled Administration and Enforcement, which includes §§ 1140 and 1132, the sections under which Simpson has brought his ERISA claim. *See supra*, p. 16. It would also not be exempt from Part 1, entitled Reporting and Disclosure, which includes §§ 1024 and 1025, the other ERISA sections on which Simpson bases his claim. Id.

For all the above reasons, the four plans in question are ERISA plans.

II. Simpson Is A Participant In The Ernst & Young Plan

Ernst & Young contends that Simpson was not a participant in the Ernst & Young Plan because he never satisfied the eligibility requirements.

A participant is "any employee ... who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . ." 29 U.S.C. § 1002(7). Thus, an ERISA plan participant does not have to be presently eligible to receive plan benefits. The fact that Simpson had not yet attained the age or years of service requirements does not mean that he was not a participant. To hold otherwise would limit ERISA protection only to those who have already vested or have obtained nonforfeitable rights to pension benefits.

Ernst & Young also contends that our finding that Simpson was an employee precludes him from eligibility under the Ernst &

Young Plan since eligibility is predicated on admission to the partnership. This argument has no merit. Ernst & Young did not cite the section of the Ernst & Young Plan setting forth this requirement. Furthermore, the Ernst & Young Plan is embodied in the U.S. Agreement, which was carefully drafted to apply to "Parties," rather than to "Partners." Also, the Ernst & Young Plan provided retirement income to both "Capital Account Parties" (CPAs) and to "Investment Account Parties" (non-CPAs), the latter being specifically excluded as Partners from the Ernst & Young Partnership Agreement. Thus, the Ernst & Young Plan contemplates payment of retirement income to non-partners. Even if the plan applies only to partners, Simpson was denominated a partner, although we have found him and other partners to meet the legal definition of "employee."

III. Simpson Has Shown By A Preponderance Of The Evidence That Interference With Attainment Of His Pension Benefits Was A Determining Factor In Ernst & Young's Discharge Decision

Ernst & Young contends that Simpson has failed to prove that it acted with the specific intent to interfere with his pension benefits when it made the discharge decision. In support of its contention, Ernst & Young argues that there was not sufficient proximity between the discharge decision date and the dates when Simpson would have vested in the retirement plans. Ernst & Young also contends that Simpson's discharge resulted in no present economic savings.

The evidence of Ernst & Young's prohibited conduct for the purpose of interfering with Simpson's attainment of ERISA rights, *see infra*, pp. 24-26, establishes his *prima facie* case under § 1140. *See Humphreys*, 966 F.2d at 1043. Ernst & Young has met its burden of articulating legitimate, nondiscriminatory reasons for Simpson's discharge by contending it discharged Simpson because of an independence problem, poor performance, and poor attitude. Id.

Simpson has established by a preponderance of the evidence that Ernst & Young's articulated reasons for discharge are pretextual. At the jury trial on Simpson's ADEA claim, the jury

found none of these reasons credible. For the following reasons, we agree.[7]

Ernst & Young contended during the trial that Simpson was discharged because of an independence problem regarding Simpson's personal loans from a lending institution that became an Ernst & Young client as a result of the merger. Ernst & Young went to great lengths, including calling an expert witness, to convince the jury that this independence issue was a substantial problem regarding Simpson's performance. Despite a contemporaneous memorandum from Hill to Boland outlining the alleged independence problem,[8] the undisputed evidence shows that after Ernst & Young investigated the matter, Management Committee Member Boland advised Simpson that his loans *did not* present an independence problem. Thus, Simpson was exonerated regarding the independence issue before he was discharged. *See* Boland testimony, Doc. 218, p. 1761. The extent to which Ernst & Young attempted to expand this matter into a critical performance issue that warranted Simpson's discharge indicates that it was concealing the true motive for discharge.

Ernst & Young also contended at trial that Simpson was discharged because he had an inadequate number of billable hours, failed to cooperate in the investigation of the alleged independence problem, entered into a poor lease arrangement for the Arthur

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[7] In order to find in favor of Simpson on his age discrimination claim, the jury had to have found the reasons advanced by Ernst & Young to be pretextual. We agree with the jury's conclusion. In any event, we are bound by that jury finding regarding Simpson's ERISA claim. *See Gutzwiller v. Fenik*, 860 F.2d 1317, 1332 (6th Cir. 1988).

[8] Hill appeared to be on a campaign to eliminate his former competitor, Simpson. After the merger was announced, but before it took place, Hill approached his Ernst & Whinney superior Boland to tell him that Simpson was not the type of person the firm wanted. (Doc. 212, p. 1560). Boland later chose Hill over Simpson as Cincinnati Managing Partner. Shortly after Hill and Simpson began working together, Hill raised the independence issue through the aforementioned memorandum. There is no evidence that the Management Committee was aware of any of this information when it voted to discharge Simpson.

Young office, and spent too much of the firm's money on marketing and client development.

Ernst & Young attempted to portray Simpson as a disgruntled worker who was unhappy with his demotion from the position of Cincinnati Managing Partner. Simpson had once before been subjected to a demotion as a result of a merger. When KMG/MH merged with Arthur Young, Simpson lost his Managing Partner position. He quickly regained it. Thus, Simpson was familiar with merger politics, and the fact that he may not have been pleased with his demotion resulting from the Ernst & Young merger is not a measure of his performance.

After the merger, Simpson was granted a "unit increase," which is an indicator of good performance. As of December 1989, Simpson's salary was increased 17% over the prior year. Such an increase is substantial and not merely a cost of living increase. It indicates that Simpson's superiors at Ernst & Young viewed his performance as more than acceptable.

Management Committee Chairman Miles was unaware of any alleged performance problems when he voted to discharge Simpson. (Doc. 207, p. 1054). Nor is there evidence that any other Management Committee members save Boland were aware of alleged performance problems when they voted to discharge Simpson. Had such problems been the basis for Simpson's discharge, one would expect to find a memorandum from Boland, Simpson's Regional Supervisor, to the Management Committee detailing the problems and recommending discharge. No such document was introduced. Furthermore, Ernst & Young produced no evidence that it had formally evaluated Simpson's performance and/or found it lacking. Ernst & Young did not have an evaluation procedure in place when Simpson's discharge decision was made.

The Management Committee had available to it performance evaluations reflecting Simpson's tenure at Arthur Young, but did not review them before discharging him. This indicates they were not concerned with performance when they made their discharge decision. Simpson's Arthur Young evaluations were all favorable. His apt performance at Arthur Young is also shown by his promotion to Arthur Young Cincinnati Office Managing Partner.

Ernst & Young's proffered reason is also contradicted by the testimony of their own expert witness, economist Julia Lane. She testified that when a firm makes a decision to discharge a partner, labor economics theory and experience indicate that the discharge decision is based on productivity; i.e., whether the employee is producing more or less than he is costing the firm. To make this determination, it is very important to review the worker's performance evaluations. (Doc. 212, p. 1353). Workers are not likely to be discharged during their first year, because the firm is in the process of determining whether the individual can adequately perform the job and will provide him a reasonable opportunity to do so. (Id. at p. 1367). According to Dr. Lane's prognostication, a worker is most likely to be discharged during the tenth year of employment with a given employer and least likely to be discharged during the first year. (Doc. 212, p. 1370). Ernst & Young had employed Simpson for less than a year when it discharged him.[9] It is most likely that Ernst & Young decided to discharge Simpson at the February 21, 1990 Management Committee meeting (*see* review of documentary evidence, *supra*, p. 7), which was less than four months after he began working for Ernst & Young and only two months after he received a substantial salary increase.[10] Ernst & Young rendered its discharge decision, at the latest, in May 1990, only seven months after the merger and only five months after Simpson received a substantial salary increase. Dr. Lane's testimony demonstrates that Simpson's discharge was contrary to her theory of normal business practice.

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[9] Dr. Lane placed Simpson in his fourth year of Ernst & Young employment, taking into account his prior Arthur Young service, and testified his discharge was consistent with her theory. We agree with the jury in rejecting this conclusion. It is more reasonable to consider Simpson to have been in his first year of Ernst & Young employment, because the merger placed him under the supervision of former Ernst & Whinney partners Hill and Boland, who were not familiar with Simpson's past performance.

[10] A February 21, 1990 discharge decision would have been made shortly after Miles' December 28, 1989 and Schornack's February 7, 1990 responses to Simpson's pension inquiries.

Supporting our view of Dr. Lane's testimony is the fact that Simpson was required to formally set his 1990 goals in December 1989, yet he was discharged before half the year had elapsed. He was not given a reasonable time to meet the goals set. This indicates that Simpson was discharged for some reason other than failing to meet his performance goals.

Prior to his May 22, 1990 conversation with Boland, at which time he was asked to resign, Simpson had not been informed of any performance problems and given a chance to offer an explanation or take corrective action. On May 22, 1990, Simpson returned to his office after a coffee break to find Boland sitting there. Boland got up, closed the door, and asked Simpson to resign. Simpson testified that Boland's conduct completely surprised him. In view of Ernst & Young's acknowledged policy to give their workers an opportunity to correct performance problems, Ernst & Young's failure to even warn Simpson and give him a chance to improve his performance makes it unlikely that performance had anything to do with Simpson's discharge. Simpson was not a clerical worker, but a CPA with many years of experience. He was specialized in representing entrepreneurial businesses. As such, the firm had an investment in Simpson. If performance was really an issue, it would be much more likely that management would take steps to improve Simpson's performance rather than summarily discharge him.

The validity of Ernst & Young's proffered reason for discharging Simpson is also called into question by the absence of any contemporaneous record of the date the decision was made or the reasons therefor. The undated Ernst & Young Management Committee document memorializing Simpson's discharge gives no reason for his discharge, performance or otherwise. Hill's September 1990 memorandum, purporting to list several reasons for Simpson's discharge, came after Simpson filed an EEO complaint and must be considered self serving. Common sense dictates that in the case of a legitimate discharge decision, documentation would be made contemporaneously with the discharge decision, not four to seven months later. The lack of documentation surrounding Simpson's discharge by the self-proclaimed world's largest accounting firm, which constantly relies

on documentation in performing its daily functions, is highly unusual.

Through Boland's testimony at trial, Ernst & Young presented reasons for discharging Simpson that had not previously been asserted during discovery. This suggests that Ernst & Young invented such reasons sometime after discovery concluded. At trial, Boland claimed Simpson's performance at Arthur Young in 1986 was poor. Boland also testified that conversations he had with others about Simpson — before the merger and before he even met Simpson — influenced his decision that Simpson be discharged. (Doc. 218, pp. 1586-87). In his deposition, however, Boland testified that an individual's performance before the October 1989 merger was not relevant to him insofar as it related to his evaluation of that individual. (Doc. 218, p. 1589).

Boland's testimony as to the reasons for Simpson's discharge conflicted with that of Management Committee Chairman Miles and Cincinnati Managing Partner Hill. Boland testified that Simpson was "absolutely not" discharged because of the general need to reduce partners as a result of the merger. He claimed Simpson was discharged for his poor attitude and poor performance. (Doc. 218, p. 1686). In direct contrast, Miles testified that Simpson was discharged as part of a nationwide reduction in force due to the overall economic situation faced by the newly merged firm. (Doc. 207, pp. 1025-26, 1056). In further contrast, Hill testified that Simpson was discharged primarily because his charge hours were low (Doc. 209, p. 1139) and because of a local economic recession in the Cincinnati, Ohio area. (Doc. 209, p. 1141, 1246-47).

The testimony of Miles, Boland, and Hill also conflicted on the subject of who made the decision to discharge Simpson. Hill initially claimed that he decided to discharge Simpson (Doc. 209, p. 1111), but later acknowledged he had no authority to make such a decision. (Doc. 209, p. 1271). Hill also claimed that he recommended Simpson's discharge to Boland. (Doc. 209, p. 1138). Boland testified that he made his own decision to discharge Simpson. (Doc. 218, p. 1671). There was no documentation that Boland made a discharge decision, nor was there any evidence that he presented his asserted discharge decision to the Management Committee for approval. Miles testified that the Management Committee decided to discharge Simpson. He said Simpson was

discharged along with many others as part of a general economic lay off. (Doc. 207, p. 1083).

Miles' testimony that Simpson and others were discharged for economic reasons is credible to the extent that it appears most likely that economic reasons motivated Ernst & Young's discharge of older partners in order to lessen its salary and future pension obligations. That conclusion is supported by the contemporaneous documentary evidence. (Def. Tr. Ex. 582). Boland and Hill, on the other hand, were impeached numerous times by their prior statements and other contradictory evidence, and no contemporaneous documentary evidence supports their testimony. We do not credit Miles' conclusory denials of age discrimination and ERISA violations for the reasons set forth herein.

The startling inconsistencies in the testimony of the three superiors directly involved in Simpson's discharge undoubtedly influenced the jury, as it does the Court, in finding that the legitimate reasons these witnesses proffered are not credible.

Thus, Simpson has shown by a preponderance of the evidence that the discharge reasons proffered by Ernst & Young based on Simpson's performance and attitude either had no basis in fact or did not actually motivate his discharge. *See Manzer*, 1994 WL 374789 at *4-5. Therefore, there exists a permissive inference that Ernst & Young discharged Simpson for the purpose of interfering with his ERISA protected rights. *See* id. at *4, *explaining St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). The lack of any notification to Simpson of his alleged performance problems shows that Simpson had no way of knowing the firm was contemplating his discharge. Because only Ernst & Young knows the real reason behind Simpson's discharge, the pretext finding is more significant than it might be in a case where both sides had access to that information. We find Ernst & Young's proffered explanations to be so unworthy of belief as to allow the permissive inference, together with the evidence of a *prima facie* case, to support a judgment in Simpson's favor. *See* id.

In addition, we now look to the evidence surrounding Simpson's discharge to determine whether a preponderance of the evidence shows that ERISA violations motivated the discharge.

It is more likely than not that the decision process to lay off partners began in December 1989. The December 18, 1989 Management Committee agenda includes a list of former Arthur Young and Ernst & Whinney partners by age, showing the total number of years with each respective firm and the total number of years as a partner. These are items considered in determining whether a participant has reached the vesting requirements for the Defined Benefit Plan, Retirement Savings Plan, and Ernst & Young Plan. The February 21, 1990 Management Committee agenda addresses "Partner resignations and retirements" and, in that regard, included a table entitled "Comparison of Partner Ages 1990." Age is one factor in determining whether a participant has reached the vesting requirements of the Ernst & Young Plan.[11] Neither Miles, the Management Committee Chairman, nor Boland, a Management Committee Member, could offer a legitimate explanation of what use the Management Committee made of these figures. (Doc. 207, p. 1053; Doc. 218, p. 1736).

It is significant that the tabular breakdown of the individuals by age and years of service was attached to the December 1989 agenda under the heading "Partner movement and retention" rather than the heading "Partners Pension Plan status report." What is equally significant is what is not attached to either the December 1989 or February 1990 agendas. If the Management Committee had been making discharge decisions based on legitimate business reasons, such as employee productivity, billable hours, client base, and/or revenue production, it would be expected that such information, including performance evaluations, would have been attached to the agendas with regard to the topics of "Partner movement" or "Partner resignations." *See Nemeth v. Clark Equipment Co.*, 677 F.Supp. 899, 905 (W.D. Mich. 1987). Had such been the case, Ernst & Young would have had a more

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[11] Age, as a criterion for making a discharge decision, does not itself violate ERISA. However, when age is an eligibility requirement of a retirement plan, the use of age as a criterion for making a discharge decision, if found to be a motivating factor in the discharge decision, may result in an ERISA violation. *See Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1707 (1993).

compelling argument that the effect on Simpson's retirement benefits was merely incidental.

This evidence, coupled with the existence of a $290,000,000 unfunded future pension obligation and economic expert Harvey Rozen's testimony as to the resulting savings to Ernst & Young, *see infra*, p. 28, indicates that, in addition to age, interference with the attainment of retirement benefits was a motivating factor in Ernst & Young's discharge decisions. This evidence also indicates that Ernst & Young's decision to discharge Simpson was made with the specific intent to interfere with Simpson's attainment of pension benefits in the Defined Benefit Plan, Retirement Savings Plan, and Ernst & Young Plan. *See also Gavalik*, 812 F.2d at 854; *Pennachio v. Farrell Lines, Inc.*, 85 Civ. 6953, 1987 WL 26796, at *5 (S.D.N.Y. Nov. 25, 1987).

Because Simpson had a vested right to receive payment from the UBT Account, Ernst & Young's discharge decision was not made with the specific intent to interfere with Simpson's attainment of those retirement benefits. Subsequently, however, after telling him the calculated amounts were binding on the parties, Ernst & Young withheld from Simpson funds payable to him under that retirement plan. Ernst & Young's withholding of money from Simpson's UBT Account payments supports an inference of mendacity on Ernst & Young's part. *See Hicks*, 113 S.Ct. at 2749.

A. Ernst & Young's Contention That There Is Insufficient Proximity Between The Discharge Date And The Vesting Date Is Not Persuasive

Ernst & Young contends there was not sufficient proximity between the discharge date and the dates when Simpson would have vested in the retirement plans to support a causal connection between Simpson's discharge and his retirement plans.

The discharge decision was made known to Simpson in May 1990, effective December 1990. Simpson was then already vested in the UBT Account; therefore, his discharge did not affect the attainment of his rights thereto. He would have vested in the Defined Benefit Plan or Retirement Savings Plan after five years of combined service with Arthur Young and Ernst & Young, in December 1991. Thus, his discharge came one year before he vested in two of the plans. This is sufficiently proximate,

combined with the other evidence, to warrant an inference of intent to violate ERISA. At the earliest, Simpson would have vested in the Ernst & Young Plan at the age of 58 and after 15 years of service, in December 2001. The time differential between Simpson's discharge and his vesting date in the Ernst & Young Plan is too lengthy to alone support an inference of intentional interference with pension rights. However, the ability to substantially reduce the $290,000,000 pension obligation shortfall on Ernst & Young's financial statements demonstrates an immediate economic benefit the firm achieved by discharging Simpson and others. In other words, it is not time between discharge and the Ernst & Young Plan vesting date that supports an inference of an ERISA violation, but rather the proximity between the discharge date and the reduction of future pension benefit obligations

Assuming, *arguendo*, that Simpson showed insufficient proximity between the date of the discharge decision and the vesting dates, *see e.g.*, *Humphreys*, 966 F.2d at 1044, this is not fatal to his claim. Although proof of proximity is circumstantial evidence of intent, lack of proximity does not preclude Simpson from offering other evidence, both direct and circumstantial, of Ernst & Young's intent, which he has done. *See e.g.*, *Gavalik*, 812 F.2d at 834.

Garrett v. Detroit Edison Co., No. 86-1257, 1988 WL 12208 (6th Cir. Feb. 16, 1988), *Clement v. Madigan*, 820 F.Supp. 1039 (W.D. Mich. 1992), and *Brown v. ASD Computing Center*, 519 F.Supp. 1096 (S.D. Ohio 1981), cited by Ernst & Young, are distinguishable because they address the period between the employee's protected activity and the employer's retaliatory action, rather than the period between the discharge decision and the vesting date.

In *Humphreys*, the fact that the employee was discharged two months before his vesting date, coupled with a resulting general economic savings to the employer, was not enough to sustain the employee's claim in the face of the fact that the mine that the employee had managed was sold and the fact that he was perceived as not being a "company man", which the Sixth Circuit found to be legitimate reasons for the discharge decision. What was fatal to the employee's claim in *Humphreys* was that he failed to show a causal link between his pension benefits and the discharge decision.

Humphreys, 966 F.2d at 1044. In contrast, Simpson has shown that in the several months before his discharge and that of other employees, the Management Committee was reviewing its employees' status based upon their eligibility requirements for vesting in the retirement plans, rather than for legitimate business reasons. The discharge of these employees resulted in an immediate reduction of future pension benefit obligations, permitting Ernst & Young to show a more favorable picture in its financial statements.

B. Ernst & Young's Contention That Simpson's Discharge Resulted In No Present Economic Savings Is Not Persuasive

Ernst & Young contends that Simpson's discharge resulted in no present economic savings, thus precluding his ERISA claim. This contention has no factual or legal basis.

Ernst & Young cites no caselaw in support of its position. Proof of specific intent to interfere with the attainment of pension benefits constitutes an ERISA violation, whether or not the interference is successful and whether or not the employee would have received the benefit absent the interference. *Gavalik*, 812 F.2d at 851-52, *citing Zipf v. American Telephone and Telegraph Co.*, 799 F.2d 889, 893 (3rd Cir. 1986). This is evidenced in the language of § 1140, which forbids certain conduct taken for the purpose of interfering with the attainment of any right to which the participant may become entitled. *Zipf*, 799 F.2d at 893. Thus, to prevail, it is not necessary for Simpson to show that Ernst & Young's decision to discharge him and 119 others resulted in an actual reduction of the firm's $290,000,000 unfunded future retirement plan obligation that existed in October 1989. It is sufficient to show that Ernst & Young *intended* to reduce its pension obligations.

Nevertheless, the average savings to Ernst & Young per person terminated was $45,702, which resulted in an annual savings of $5,484,240. Economist Harvey Rozen testified that this annual savings directly reduced the amount of the unfunded retirement obligation, since the base for calculating retirement benefits under the Ernst & Young Plan was the average of the retiree's three highest years' salary. The average age of the discharged partners was 44.8 as compared to the average age of 37.5 for newly

admitted partners. Based on this, Dr. Rozen testified that Ernst & Young reduced the present value of its retirement obligation by postponing the date upon which such benefits would be paid.

We are also not persuaded by Ernst & Young's contention that had interference with the attainment of pension rights been a motivating factor, it would have selected more partners for discharge who had not yet vested in the retirement plans. The facts do not support this contention; while only 10.8% of the discharged partners were not vested in the Defined Benefit and Retirement Savings Plans, a very substantial majority of the discharged partners were not vested in the Ernst & Young Plan.

This finding is not intended to have a chilling effect on an employer's ability to analyze its economic situation, including its present and/or future pension obligations. Employers must be able to discharge employees for economic reasons. Employers must be able to review their future pension obligations to insure that they may be fulfilled. But when an employer discharges an employee with the specific purpose of preventing that employee from receiving pension benefits, the employer violates ERISA.

IV. The Favorable Jury Verdict On Simpson's Age Discrimination Claim Does Not Bar His ERISA Claim

Ernst & Young contends that Simpson's ERISA claim is barred by the prior jury verdict that he was discharged by Ernst & Young because of his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* Ernst & Young contends that since the jury was instructed in the ADEA trial that they must find in Simpson's favor if they find by a preponderance of the evidence that Ernst & Young would not have discharged Simpson but for his age, that the jury already ruled that age was the determining factor in his discharge, therefore precluding any other determining factor.

Ernst & Young's argument is disingenuous. The pertinent jury instruction was as follows:

> In this case, it's undisputed that the Plaintiff was in the protected age group and he was discharged by the Defendant. You must decide whether Plaintiff's age was a "determining factor" in Defendant's discharge decision. Although there may be more than one factor involved in the decision to

discharge him, Plaintiff is nevertheless entitled to recover if age was a determining factor. In other words, if you find by a preponderance of the evidence that Defendant would not have discharged Plaintiff but for his age, you must find for Plaintiff. If Plaintiff has failed to prove his age was a determining factor in his discharge, you must find for Defendant.

To find in favor of Simpson, the jury did not have to find that age was *the* determining factor, only that age was a determining factor. Thus, there may have been more than one determining factor in Ernst & Young's discharge decision. *See Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1707 (1993). Therefore, the fact that Simpson prevailed on his age discrimination claim against Ernst & Young does not preclude his ERISA claim.

Furthermore, to accept Ernst & Young's argument would be tantamount to a finding that the "but for" instruction given to the jury *at the behest of Ernst & Young* was improper. This we will not do. The Sixth Circuit has used the "a determining factor" and "but for" concepts interchangeably; the two instructions are not different in any substantive way. *Cooley v. Carmike Cinemas*, 25 F.3d 1325 (6th Cir. 1994).

V. Simpson Has Shown By A Preponderance Of The Evidence That He Was Discharged In Retaliation For Inquiring Into His Retirement Benefits

Regarding Simpson's retaliation claim, Ernst & Young contends that Simpson's letters address items to which he was not entitled under the terms of any of the retirement plans. Specifically, Ernst & Young contends that Simpson was asking only for a hypothetical calculation concerning his UBT Account, which was something "outside" the retirement plans. We have already determined that the UBT Account is an ERISA plan. *See supra* p. 15. Ernst & Young contends that Simpson's complaints about what a retirement plan did or did not provide is not equivalent to exercising a right under a retirement plan. Ernst & Young also contends that Simpson's letters did not relate to rights under ERISA's subchapter I.

The evidence that Simpson engaged in protected activity which caused his discharge, *see infra*, pp. 19-20, establishes his *prima*

facie case of retaliation under § 1140. *See Rath*, 978 F.2d at 1090. Ernst & Young met its burden of articulating legitimate, nondiscriminatory reasons for Simpson's discharge. *See supra*, pp. 19-20.

Simpson has established by a preponderance of the evidence that Ernst & Young's articulated reasons are pretextual.

ERISA's § 1140 prohibits the discharge of a participant for exercising any right to which he is entitled under a retirement plan or under subchapter I, 29 U.S.C. §§ 1001 thru 1145. Thus, we must examine ERISA's statutory provisions in addition to the specific retirement plan provisions in determining Simpson's retaliation claim. *See Pennachio*, 1987 WL 26796 at * 4.

Pursuant to 29 U.S.C. § 1024(b)(1), the plan administrator must pr[illegible]de to each participant "all modifications and changes" to an ERISA plan. Pursuant to 29 U.S.C. § 1024(b)(4),

> The administrator shall, upon written request of any participant . . . furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

Pursuant to 29 U.S.C. § 1025(a), a plan participant has a statutory right to inquire into the benefits available to him under an ERISA plan. This section provides:

> Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information — (1) the total benefits accrued, and (2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which such benefits will become nonforfeitable.

The plan administrator is also required to provide computations to support the amount stated upon a plan participant's request. *Bartling v. Fruehauf Corp.*, Nos. 93-3281, 93-332-1 WL 371578 (6th Cir. July 19, 1994) (to be reported at 29 F.3d 1062); *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan and Trust Agreement*, 822 F.Supp. 247 (E.D. Pa. 1993), *reversed on other*

grounds, 24 F.3d 1491 (3rd Cir. 1994). Individualized reporting and disclosure play an important role in effecting ERISA's goals and replaces the limited disclosure provisions of the prior Welfare and Pension Plan Disclosure Act. *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 933-34 (3rd Cir. 1985), overruled on other grounds by *Pritzker v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3rd Cir. 1993). The broad disclosure interest protected is the ability of a participant to effect his financial planning. Id. Disclosure should be favored where it will help participants understand their rights. *Bartling*, 1994 WL 371578 at *7.

Simpson's letters and the responses thereto show that his inquiries were not limited to questions involving the UBT Account. Simpson was making a comparison between his expected retirement benefits before and after the merger; only one factor in that comparison was the UBT Account value. Simpson's dialogue with the Management Committee began with a request on behalf of himself and two others that they be granted credit for their prior years service with KMG/MH. Simpson subsequently requested that "someone calculate what our retirement benefits, including our UBT values, would have been under the former [Arthur Young] plan and the E & Y plan." Simpson also asked for the "difference in our vesting between the former [Arthur Young] plan and E & Y plan."

Simpson's requested information was the type of individualized reporting that ERISA sought to provide for participants to enable them to do their financial planning. *Barrowclough*, 752 F.2d at 933-34. This was squarely an inquiry as to the benefits available to him under an ERISA plan, including a calculation of those benefits and a request for information as to a modification in his retirement benefits. Furthermore, Simpson's expressed concern that "to spend 27 years as a partner and not receive 100% retirement benefits just is not fair" is one evil ERISA seeks to protect against; *i.e.*, employees with long years of service losing retirement benefits due to lack of vesting. 29 U.S.C. § 1001(a). Simpson had the right to request and receive this information under ERISA. 29 U.S.C. §§ 1024(b), 1025(a). Simpson also had a right to request and receive this information independent of Ernst &

Young's representation that post-merger retirement benefits would be better than pre-merger retirement benefits.

Ernst & Young contends that information provided to Simpson before the merger satisfied their obligation under §§ 1024(b) and 1025(a) and that the Management Committee's responses provided Simpson with all the information to which he was due. The facts do not support this contention. When Simpson pressed the issue, still having unresolved questions and concerns, the Management Committee Chairman stated that "he did not wish to write further on this subject" and another Management Committee member told him to "call it a day" on the issue. Furthermore, the adequacy of Ernst & Young's response is not determinative of the issue whether Simpson was discharged in retaliation for his inquiries. To hold otherwise would defeat the purpose of § 1140, as it would allow the unscrupulous employer to discharge employees with full impunity so long as the employer adequately responded to the request that triggered the discharge.

The two cases cited by Ernst & Young in support of its position are distinguishable. In *Rush v. McDonald's Corp.*, 966 F.2d 1104 (7th Cir. 1992), the plaintiff did not claim that she was d charged because of inquiries as to her retirement benefits. In *Fischer v. Doremus & Co.*, No. 83 C 8214, 1985 WL 9495 (N.D. Ill. Feb. 4, 1985), the employee's "complaints" were found to have no reasonable basis. In the present action, Simpson's inquiries had a reasonable basis. Had they not, they would not have been presented to the Chairman by Management Committee member Schornack.

In view of the above, we find that Simpson was engaged in activity protected by ERISA. We now turn to the issue of whether Simpson's inquiries were a motivating factor in Ernst & Young's discharge decision.

There are several indicia that Simpson was discharged because of his inquiries. All of Simpson's pension inquiries were made before his discharge. Several members of the decision-making body, including Miles, Boland, and Schornack, were aware of Simpson's inquiries at the time they voted to discharge him. At the time of the discharge vote, Miles was aware that Simpson was not vested in any of the retirement plans, except the UBT Account. It

is also reasonable to infer that Boland was aware of this fact, because he received Miles' December 1989 letter noting Simpson's vesting date for the Defined Benefit and Retirement Savings Plans. Miles testified that Simpson was the only individual who approached him on this issue. This testimony discounts Ernst & Young's contention that others who inquired, *i.e.*, Hindman and Fritz, were not discharged. There was no evidence that Hindman or Fritz made any direct inquiries on this issue. Schornack testified that others in the same position as Simpson who did not make such inquiries were not discharged, but these people were never identified. Hill testified that he recommended Simpson for discharge due to his unhappiness with the merged firm, as reflected by Simpson's retirement inquiries. The closing paragraph in Miles' December 1989 correspondence suggests that he thought Simpson's inquiries were irksome. Finally, as set forth in Section III *supra*, pp. 18-26, the several reasons advanced by Ernst & Young for Simpson's discharge based on his performance and attitude are pretextual. Taken together, Simpson has shown that it is more likely than not that his inquiries into his retirement benefits was a motivating factor in Ernst & Young's decision to discharge him. *See Rath*, 978 F.2d at 1090.

VI. ERISA Does Not Provide For Compensatory Or Punitive Damages

Simpson seeks lost retirement benefits as well as compensatory and punitive damages. In the context of ERISA, compensatory and punitive damages are often referred to as extracontractual damages, not being available under the terms of a benefit plan. *E.g.*, *Gaskell v. Harvard Cooperative Society*, 762 F.Supp. 1539 (D.Mass. 1991), *vacated on other grounds*, 3 F.3d 495 (1st Cir. 1993). Ernst & Young contends that Simpson is limited to the relief provided in 29 U.S.C. § 1132(a), which provides only for equitable, not legal, remedies.

There are two sections of § 1132(a) which may apply to Simpson:

> A civil action may be brought by a participant . . . to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a)(1)(B).

> A civil action may be brought by a participant . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3).

The language of § 1132(a)(1)(B) is limited to the recovery of benefits under the terms of the plan. Because none of the retirement plans provide for compensatory or punitive damages, Simpson cannot obtain these damages under § 1132(a)(1)(B). *See Medina v. Anthem Life Insurance Co.*, 983 F.2d 29, 31 (5th Cir.), *cert. denied*, 114 S.Ct. 66 (1993); *Harsch v. Eisenberg*, 956 F.2d 651 (7th Cir.), *cert. denied*, 113 S.Ct. 61 (1992); *Reinking v. Philadelphia American Life Insurance Co.*, 910 F.2d 1210 (4th Cir. 1990), *overruled in part on other grounds by Quesinberry v. Life Insurance Co. of North America*, 987 F.2d 1017, 1030 (4th Cir. 1993) (*en banc*).

The remaining issue is whether extracontractual damages may be awarded as "other appropriate equitable relief" under § 1132(a)(3).

In *Massachusetts Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the Supreme Court held that a plan fiduciary could not be held personally liable under § 1109 for extracontractual damages caused by improper claims processing. ERISA § 1109 provides that a fiduciary who breaches any of his responsibilities shall be subject to such "other equitable or remedial relief" as the court deems appropriate. Although this language is very similar to "other appropriate equitable relief" language in § 1132(a)(3), because the plaintiff relied on § 1109 and expressly disclaimed reliance on § 1132(a)(3) the Supreme Court said that it had "no occasion to consider whether any other provision of ERISA authorizes recovery of extra-contractual damages." *Russell*, 473 U.S. at 139, n. 5. Nevertheless, the Court stated that "the six carefully integrated civil enforcement provisions found in § 502(a) . . . provide strong evidence that Congress did not intend to

authorize other remedies that it simply forgot to incorporate expressly." Id. at 146.

Prior to the decision of the Supreme Court in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), the United States Courts of Appeals were virtually unanimous that extracontractual damages were not available under § 1132(a)(3). *O'Neil v. GenCorp, Inc.*, 764 F.Supp. 833, 835 (S.D. N.Y. 1991) *citing Drinkwater v. Metropolitan Life Insurance Co.*, 846 F.2d 821 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988); *Powell v. Chesapeake & Potomac Telephone Co. of Virginia*, 780 F.2d 419 (4th Cir.1985), *cert. denied*, 476 U.S. 1170 (1986); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1465 (5th Cir), *cert. denied*, 479 U.S. 1034 and 479 U.S. 1089 (1987); *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir.1987); *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 627 (7th Cir.1987); *Sokol v. Bernstein*, 803 F.2d 532, 534 (9th Cir.1986); *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989).

In *Ingersoll-Rand*, which involved a plaintiff seeking extracontractual damages of future lost wages, mental anguish, and punitive damages, the Supreme Court held that ERISA preempted a state common law claim that the plaintiff had been wrongfully discharged to prevent his attainment of benefits under an ERISA plan. 498 U.S. 133. The Supreme Court justified preemption in part on Congress's intent that § 1132(a)[12] provide the exclusive remedy for rights guaranteed under ERISA, including those set forth in § 1140. Id. at 143-144. Drawing an analogy to the broad preemptive force of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, the Supreme Court noted that federal preemption in ERISA displaces all state law claims, "even when the state action purported to authorize a remedy unavailable under the federal provision." Id. at 144, *quoting Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 55 (1987). Thus, although ERISA provides benefits to employees that were lacking at common law, it may also

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[12] Although the Supreme Court specifically addressed § 1132(a)(3) at one point in its opinion, it repeatedly referred to § 1132(a) in general.

leave potential plaintiffs with less protection in some areas. *See Mertens v. Hewitt Associates*, 113 S.Ct. 2063, 2071 (1993).

Simpson contends that the final paragraph in the *Ingersoll-Rand* opinion conclusively establishes that legal remedies, including compensatory and punitive damages, are available under ERISA:

> The preceding discussion also responds to the Texas court's attempt to distinguish this case as not one within ERISA's purview. Not only is § 502(a) the exclusive remedy for vindicating § 510-protected rights, there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here is well within the power of the federal courts to provide. Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

498 U.S. at 145.

We disagree with Simpson's interpretation. The six extensive and detailed civil enforcement provisions of ERISA, of which § 1132(a)(3) is a part, are strong evidence that Congress did not intend to provide remedies that it did not expressly incorporate. *Russell*, 473 U.S. at 146, *cited in Pilot Life*, 481 U.S. at 54 and *Ingersoll-Rand*, 998 U.S. at 144. To be meaningful, the provision for equitable relief must mean something less than all relief. *Mertens*, 113 S.Ct. at 2063. When Congress intended to afford a legal remedy, such as in ERISA § 1132(g)(2), it expressly provided for "legal or equitable relief." *See Mertens*, 113 S.Ct. at 2069-70. *See also Lorillard v. Pons*, 434 U.S. 575, 583 (1978). Furthermore, had the Supreme Court in *Ingersoll-Rand* intended to change the law, especially in view of its earlier decisions in *Russell* and *Pilot Life*, it would have done so more explicitly. *Babich v. Unisys Corp.*, Civ. A. No. 92-1473-MLB, 1994 WL 167984 (D. Kan. Apr. 8, 1994); *O'Neil*, 764 F.Supp. 833; *Gaskell*, 762 F.Supp. 1539. *See also Sprague v. General Motors Corp.*, 804 F.Supp. 931 (E.D. Mich. 1992).

The United States Courts of Appeals that have addressed the *Ingersoll-Rand* paragraph have concluded that § 1132(a)(3) does not provide for extracontractual damages, *Harsch v. Eisenberg*, 956 F.2d 651 (7th Cir.1992); *McRae v. Seafarer's Welfare Plan*, 920

F.2d 819 (11th Cir.) *reh'g denied*, 931 F.2d 901 (1991), even when the actions involve wrongful discharge and are brought under § 1140. *Spinelli v. Gaughan*, 12 F.3d 853 (9th Cir.1993).[13]

Prior decisions of this Court and the Sixth Circuit support a limitation on § 1132(a)(3) as providing only equitable remedies. In *Miner v. Community Mutual Insurance Co.*, 778 F.Supp. 402 (S.D. Ohio 1991) (Rubin, J.), which involved the right to a jury trial on a claim for breach of fiduciary duty,[14] this Court recognized that *Ingersoll-Rand* had been interpreted by some district courts as establishing that legal remedies, including compensatory and punitive damages for mental anguish, are available under ERISA. Id. at 404. Nevertheless, this Court stated that it was bound by the law as interpreted by the Supreme Court and the Sixth Circuit, and found that the plaintiff was limited to an equitable remedy under § 1132 and had no right to a jury trial. Id. In *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987), which involved a § 1140 claim, the Sixth Circuit held that the statutory language and legislative history of § 1132(a)(3) prohibit the recovery of punitive damages, a type of extracontractual damages. 820 F.2d at 817.

The cases cited by Simpson in support of his interpretation of *Ingersoll-Rand*,[15] and other similar cases,[16] were all decided

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[13] Some District Courts, however, have concluded § 1132(a) permits extracontractual damages. See *infra*, n. 15.

[14] The plaintiff in *Miner* alleged a breach of fiduciary duty. The Court interpreted §§ 1132(a)(1)(B) and 1132(a)(3) in order to determine whether a new trial was appropriate.

[15] *Bittner v. Sadoff & Rudoy Industries*, 490 F.Supp. 534, 536 (E.D. Wis. 1980), *Ursic v. Bethlehem Mines*, 556 F.Supp. 571, 575 (W.D. Pa.), *affirmed in part on other grounds*, 719 F.2d 670 (3rd Cir.1983), *International Union v. Midland Steel Products Co.*, 771 F.Supp. 860 (N.D. Ohio 1991), *McDonald v. Artcraft Electrical Supply Co.*, 774 F.Supp. 29 (D.D.C. 1991).

[16] *Blue Cross & Blue Shield of Alabama v. Lewis*, 753 F.Supp. 345 (N.D. Ala. 1990), *Haywood v. Russell Corp.*, 584 So.2d 1291 (Ala. 1991).

before *Mertens v. Hewitt Associates*, wherein the Supreme Court specifically addressed the meaning of "appropriate equitable relief" under § 1132(a)(3). 113 S.Ct. 2063. In *Mertens*, the Supreme Court held that this section of ERISA did not authorize suits for money damages against nonfiduciaries who knowingly participated in a fiduciary's breach of fiduciary duty. The Supreme Court acknowledged its earlier *Ingersoll-Rand* decision that a broad interpretation of the ERISA preemption clause may result in less protection for some ERISA plaintiffs. Id. at at 2071. Thus, we interpret *Mertens* to close the door on whatever others may have read into the final paragraph of *Ingersoll-Rand*. *See Spinelli*, 12 F.3d at 857.

In view of the above, Simpson has no claim for compensatory or punitive damages under either § 1132(a)(1)(B) or § 1132(a)(3).

In light of our finding, it is not necessary to address Ernst & Young's contention that Simpson did not adequately set forth his request for punitive damages in his complaint.

VII. Simpson's Claim For A Statutory Penalty Is Precluded

At the June 24, 1994 hearing, for the first time in this case, Simpson requested relief under 29 U.S.C. § 1132(c), which provides for a penalty of up to $100 a day against a plan administrator who fails to comply with a participant's request for information. In his complaint, Simpson sought relief under 29 U.S.C. § 1132(a), and specifically cited language from 29 U.S.C. § 1132(a)(1)(B). He did not seek relief under § 1132(c). *Cf. Daniel v. Eaton Corp.*, 839 F.2d 263, 265 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988). Although § 1140 expressly states that the "provisions of section 1132 of this title shall be applicable in the enforcement of this section," this does not relieve Simpson of the duty to set forth his claims in his complaint. Nor did Simpson preserve or otherwise raise this claim in the pre-trial order. Under this Court's rule that the parties' claims and contested issues of law shall be set forth in the pre-trial order, this claim cannot now be pursued by Simpson at this stage of the proceeding.

In view of the above, it is not necessary to address Ernst & Young's contention that there is no evidence in the record that the proper party, i.e., the plan administrator, has been named in connection with this claim.

VIII. Attorney's Fees And Expense Issues Have Been Settled

The Court has been informed by the parties that they have settled the attorney's fees issues with regard to the age discrimination claim. Simpson has not claimed any additional attorney's fees relating to the ERISA claim.

IT IS THEREFORE ORDERED THAT:

1) Simpson be awarded ERISA damages in the amount of $712,529. Said damages are not to be added to the jury's age discrimination award, but rather are to be set off against it;

2) Simpson's claims for compensatory and punitive damages are DENIED; and

3) Simpson's 29 U.S.C. § 1132(c) penalty claim is DENIED.

Date 9-23-94

/s/
Robert A. Steinberg
United States Magistrate Judge

APPENDIX E

No. 95-3209

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

P. LARUE SIMPSON, Plaintiff-Appellee,

v.

ERNST & YOUNG, Defendant-Appellant.

Filed January 24, 1997

ORDER

BEFORE: KRUPANSKY, DAUGHTREY, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX F

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, provides in pertinent part:

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer — (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age * * * .

§ 630. Definitions

For the purposes of this chapter —

* * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * * .

* * *

(f) The term "employee" means an individual employed by any employer * * * .

The Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, provides in pertinent part:

§ 1002. Definitions

For purposes of this subchapter: * * *

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. * * *

Supreme Court, U.S.
FILED
APR 28 1997
CLERK

No. 96-1553

In the Supreme Court of the United States

OCTOBER TERM, 1996

ERNST & YOUNG LLP,

Petitioner,

vs.

P. LaRUE SIMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

SHOULD CERTIORARI BE GRANTED WHEN THE SOLE LEGAL ISSUE IN THE "QUESTION PRESENTED" HAS ALREADY BEEN RESOLVED BY THE APPELLATE COURT IN PETITIONER'S FAVOR, AND THE ONLY REMAINING DISPUTE CONCERNS THE EVALUATION OF STIPULATED FACTS?

SHOULD CERTIORARI BE GRANTED WHEN EACH CIRCUIT COURT OF APPEALS AGREES, CONSISTENT WITH UNITED STATES SUPREME COURT PRECEDENT, THAT THE DETERMINATION OF PARTNER VERSUS EMPLOYEE STATUS UNDER THE ADEA AND ERISA MUST BE BASED UPON A REVIEW OF ALL RELEVANT FACTS CONCERNING COMMON LAW ATTRIBUTES OF PARTNERSHIP?

SHOULD CERTIORARI BE GRANTED WHEN NO ISSUE OF CONSTITUTIONAL IMPORTANCE OR PUBLIC POLICY IS RAISED BY THE PETITION, AND INSTEAD THE ONLY ISSUE CONCERNS THE FACTUAL DETERMINATION THAT ERNST & YOUNG INTENTIONALLY DESIGNED A BUSINESS STRUCTURE WHICH CREATED THE FACADE, BUT NOT THE REALITY, OF PARTNERSHIP STATUS, THEREBY RENDERING ERNST & YOUNG LIABLE UNDER THE ADEA AND ERISA WHEN IT IMPLEMENTED ITS SCHEME TO FIRE OLDER EMPLOYEES FALSELY LABELED AS PARTNERS?

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I. STATEMENT OF THE CASE

A. Procedural Status

In what the district court described as "one of the strongest age discrimination cases" which the court had seen or heard of in sixteen years on the bench (Record at JA 3578, Transcript 5/12/94 at 5), Plaintiff-Respondent P. LaRue Simpson prevailed in his claim not due to an "absurd result," but rather due to overwhelming evidence that Defendant-Petitioner, Ernst & Young, intentionally engaged in a systematic scheme to fire older employees falsely labeled as partners and replace them with younger workers. In holding in favor of plaintiff under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et. seq.*, Employee Retirement Income Security Act, ("ERISA"), 29 U.S.C. §1001 *et. seq.* and Ohio law, the district court, the jury, and the Court of Appeals for the Sixth Circuit each agreed that Ernst & Young's actions were done in willful violation of federal and state law; each rejected as pretext the causes for discharge asserted by Ernst & Young.

Ernst & Young requests that the United States Supreme Court grant its petition for certiorari to review the unanimous opinion of the United States Court of Appeals for the Sixth Circuit in which it affirmed in every respect the judgment of the United States District Court for the Southern District of Ohio.[1] Petitioner suggests that the Court of Appeals for the Sixth Circuit committed grave error in holding that plaintiff qualified as an employee entitled to protection under the ADEA and ERISA. Ernst & Young

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[1]Judge Daughtrey concurred separately but expressly noted that she was writing to address the legislative branch "as well", rather than to disagree on any point made by her colleagues.

made this exact argument in its petition to the Sixth Circuit Court of Appeals for rehearing en banc. Not a single judge of the Sixth Circuit Court of Appeals, however, voted in favor of en banc rehearing. Appendix E to Petition at 98a.[2] Thus Ernst & Young comes to this court to re-litigate a factual and legal argument that has been soundly rejected by no less than eight jurors, two district court judges, a unanimous three judge panel of the Sixth Circuit Court of Appeals and the entire active bench of the Sixth Circuit. Appendix A, Appendix B, Appendix C, Appendix D, Appendix E.

B. The Evaluation of Stipulated Facts Concerning Plaintiff's Employee Status.[3]

Ernst & Young came into existence on October 1, 1989 upon the merger of the firms of Arthur Young & Co. and Ernst & Whinney. Appendix A at 3a-4a. Simpson and other former partners of Arthur Young and Ernst & Whinney voted on the merger by signed ballot, with no option presented as an alternative to the merger. Appendix C at 29a-30a. Non-compete agreements with the predecessor firms continued in force and were later supplanted by new non-compete agreements. (*See, e.g.*, Record at JA 3760, Exhibit 73, internal memorandum referring to the new non-compete for Ernst & Young that "blends provisions previously utilized by Arthur Young and Ernst & Whinney";

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[2]Hereinafter all Appendix citations refer to the Appendix to the Petition for Certiorari.

[3]The parties stipulated in the district court that no genuine issue of material fact existed concerning Simpson's relationship with Ernst & Young, and agreed to submit the issue of his employee status to the court on cross-motions for summary judgment. The appellate court reviewed the issue of summary judgment *de nova*. Appendix A at 10a, n. 1.

See also, Appendix A at 12a.) Thus, even the option of leaving the firm was foreclosed as an alternative to the merger.

In describing the merger process, the Sixth Circuit observed:

> the promoters of the merger prevailed upon Simpson and other personnel similarly situated to execute documents designed to centralize all power to manage the newly-created firm and its assets through an intentionally ambiguous business structure calculated to divest Simpson and others similarly situated of all indicia of meaningful partnership participation in the new firm.

Appendix A at 5a-6a.

The Court of Appeals for the Sixth Circuit describes the "convoluted Partnership and U.S. Agreements [for Ernst & Young] which were calculated to create only an illusion that the firm's personnel were partners." (Appendix A at 11a). Indeed, the Ernst & Young operating agreement is not a partnership agreement, but rather is entitled: "Agreement of the Parties-U.S." Appendix A at 4a. Ernst & Young concedes that it carefully avoided referring to this operating agreement as a partnership agreement because the parties to the agreement included both certified public accountants [C.P.A.s] and non-C.P.A.s. Professional standards governing C.P.A.s prohibit a C.P.A. firm from including non-C.P.A.'s as co-owners. Petition at 3, n.1.

In describing this operating agreement to the parties of Ernst & Young, the Management Committee explained: "To further ensure our compliance with state accountancy

laws . . . the terms 'Party,' 'Capital Account Party,' and 'Investment Account Party' are utilized in the agreement rather than 'Partner' even though in our internal communications and for tax purposes all of us shall be referred to and treated as partners." (Record at 3760, Exhibit 73 at 1). Thus the Sixth Circuit observed: "the characterization of 'partner' was a title that carried no legal significance which could be disclaimed when convenient to the defendant's management." Appendix A at 6a.

In addition to the "Agreement of the Parties-U.S.", the parties of Ernst & Young who were C.P.A.'s were also signatory to a second agreement, entitled the Ernst & Young Partnership Agreement. Appendix C at 30a. This agreement contained no mechanism for the distribution of profit. Never did Mr. Simpson receive any compensation from this entity. Appendix C at 32a. As such, it fails to meet the definition of a partnership, which is an "association of two or more persons to carry on a business for profit." N.Y. PARTNERSHIP LAW Sec. 10 (McKinney 1988).

The Sixth Circuit noted the following facts concerning the organization of Ernst & Young:

> In sum, the firm's business, assets, and affairs were directed exclusively by a 10 to 14 member Management Committee and its chairman. The Management Committee exercised exclusive control over the admission and discharge of all personnel, including Simpson. It could terminate employees without cause and without a right to appeal such decisions. The Management Committee unilaterally determined the compensation of all personnel, which authority was exercised and executed in total secrecy. Simpson and those similarly situated had no vote for

> the chairman or the members of the Management Committee. Instead, the Management Committee appointed its chairman and its chairman appointed the members of the Management Committee.

Appendix A at 6a-7a.

Simpson lacked other aspects of managerial authority as well. He had no authority to accept new clients. Appendix C at 34a. He had no authority to transfer, hire or fire people in the Cincinnati Entrepreneurial Services Department that he directed. Appendix C at 51a. He had no authority to sign an audit on behalf of Ernst & Young without prior approval from the audit committee. Appendix C at 53a. In addition, Ernst & Young asserted a claim of attorney-client privilege against Simpson to prevent him from receiving in discovery a legal opinion concerning termination of "partners." The memorandum was prepared by general counsel of the firm and directed to the firm's Management Committee. Appendix C at 33a.

The extremely curtailed nature of the rights of the non-management committee parties was summarized by the Sixth Circuit as follows:

> Simpson had no authority to direct or participate in the admission or discharge of partners or other firm personnel; participate in determining partners or other personnel compensation predicated upon performance levels, responsibility, and years of service with the firm, including his own; participate in the vote for the chairman or the members of the Management Committee; or participate in the firm's profits and losses or share in unbilled uncollected client accounts ("UBT's"). Simpson had no right to examine the

> books and records of the firm except to the extent permitted by the Management Committee. He was required to execute a will which mandated that his heirs accept as binding the accounts provided by Ernst & Young with no right of inspection or verification. He had no authority to sign promissory notes on behalf of the firm, or pledge, transfer, or otherwise assign his interest in the firm. He was refused access to data concerning various client accounts. He was denied participation in annual performance reviews and other indicia of partnership status.

Appendix A at 6a.

While Ernst & Young contends that the agreements merely contained organizational provisions essential to manage a national partnership, this contention has been soundly rejected. As stated by the district court:

> it was not 'normal business caution' to prevent him [Simpson] from voting on substantive matters, to deny him a proportionate share of firm profits, to eliminate his share in the firm's accounts receivable, to deny him personnel authority, to prevent him from examining the firm's books, and to prevent him from learning what legal advice the firm's attorneys provided.

Appendix C at 53a.

The Sixth Circuit Court of Appeals affirmed, holding: "Simpson and his similarly situated colleagues were relegated to the position of an employee subject to the virtually

absolute, unilateral control of the Management Committee." Appendix A at 6.

Notwithstanding the unequivocal evaluation of fact affirmed by the appellate court, Ernst & Young reargues to the United States Supreme Court factual allegations concerning alleged capital contributions, voting rights, methods of compensation, and unlimited liability. Each of these arguments, however, has been previously considered and rejected by the district and appellate courts. Appendix A at 10a, n.2 and Appendix C at 53a-54a (questioning the enforceability of the liability provisions due to lack of consideration); Appendix C at 47a-48a (describing the capital contribution as a "paper transaction" for which Simpson "did not invest one cent of his own money" and finding capital contribution is a loan rather than evidence of an ownership interest in the firm because it only generates interest payments, rather than a creating an equity interest in the firm's assets); Appendix C at 48a-49a (finding that compensation paid to plaintiff, which the firm treated as a salary and deducted as a business expense for state tax purposes, and which it determined in secrecy with no apparent relationship to firm profits and no relationship to ownership interest or points, is more akin to a salary paid an employee than a distribution of profits to a partner, and rejecting significance of federal tax treatment because the IRS defines a partnership more broadly than the common-law and includes any business entity which is not an estate, trust or corporation); Appendix C at 50a (finding alleged voting rights to be "illusory" and "perfunctory"); *See generally*, Appendix A at 6a-7a. Totally unpersuaded by the exact arguments which Ernst & Young repeats in this petition for certiorari, the Sixth Circuit Court of Appeals concluded: "the arrogant and arbitrary treatment accorded Simpson and those similarly situated reflect a design by . . . the promoters of

the merger and, subsequently, the Management Committee to deny Simpson and those similarly situated with him from *bona fide* partners status." (Appendix A at 11a).

Upon reviewing all the evidence, the Sixth Circuit Court of Appeals determined: "plaintiff does not qualify as a partner for purposes of the ADEA, ERISA or Ohio Rev. Code Sec. 4101.17 (Anderson 1989). . . [T]he decision of the trial court to recognize Simpson as an employee in contradistinction to partner is AFFIRMED." Appendix A at 11a.

C. The Factual Findings Concerning Age Discrimination and ERISA Violation.

The Sixth Circuit confirmed the district court's determination that Ernst & Young management induced parties to vote in favor of the merger based upon false promises that:

> (1) there would be no major head count or staff reductions as a result of the merger, (2) the merger would result in equitable or better retirement benefits for all concerned, and (3) both predecessor firms anticipated that the merger would result in an increase in cash earnings and significant growth opportunities for all concerned.

Appendix A at 4a. Despite these assurances to the "partners", the Ernst & Young Management Committee secretly voted within days of the merger to eliminate "excess staff capacity" by 5%, and set to work in the next two months to systematically fire partners. Appendix A at 4a. In executing this planned staff reduction, the Management Committee agenda included an analysis entitled "Comparison

of Partner Ages in Fiscal 1990," under the heading of "Partner Resignations and Retirements" - "where do we stand in the process." Appendix A at 5a. Simultaneously, the Management Committee addressed "The Partner Recommendation Process" or the acceptance of new [and younger] persons as "partners." *Id.* Never in this process of firing partners did the Management Committee consider lowering the compensation paid to partners or freezing new partner admissions as an alternative to systematically discharging older partners. *Id.* A member of the Management Committee testified: "It would be dumb" to lower compensation or freeze new partner admissions rather than discharging older partners. *Id.* He testified further that it was necessary to fire Simpson and other older partners to make room for the "bright young people." *Id.* Not surprisingly, the evidence demonstrated Ernst & Young fired 120 parties age forty and over in an eighteen month period (including Simpson), while simultaneously admitting 162 new parties under age 40. *Id.* Simpson was replaced as Director of Entrepreneurial Services with a partner under age forty. *Id.*

Ernst & Young's assertion in its petition for certiorari that it discharged Simpson because he had a pre-existing home mortgage loan with a bank that subsequently became a client, and for various other business reasons (Petition at 4), has also been rejected by both the appellate and district courts. In referring to the allegation concerning the bank loan, the Sixth Circuit noted: "Both the trial court and the jury rejected this argument as pretextual and specious, especially since an Ernst & Young internal investigation had absolved Simpson of any impropriety or wrongdoing." Appendix A at 5a. As to the remaining business reasons asserted, the district court observed: "The startling inconsistencies in the testimony of the three superiors directly

involved in Simpson's discharge undoubtedly influenced the jury, as it does the Court, in finding that the legitimate reasons these witnesses proffered are not credible." Appendix D at 81a.

In fact, Ernst & Young produced no documentation that it ever considered Simpson's performance in making its termination decision. To the contrary, the only information shown to be reviewed by the Management Committee in making its decision to discharge Simpson was his age and years of service with the firm, and "his tenacity in pursuing his post merger retirement benefits." Appendix A at 5a. Based upon this evidence, the jury and the district court found, and the Court of Appeals for the Sixth Circuit affirmed, that Ernst & Young willfully violated the ADEA, ERISA and Ohio law by terminating plaintiff without cause in order to make room for younger parties and in order to avoid its pension obligations to plaintiff. (Appendix A at 12a-13a)..

II. SUMMARY OF THE ARGUMENT

Ernst & Young's petition for certiorari to the United States Supreme Court fails to raise a justiciable legal issue because the United States Court of Appeals for the Sixth Circuit agrees with the legal proposition set forth in petitioner's "Question Presented," that one who truly possesses the characteristics of a *bona fide* general partner does not qualify as an employee under the ADEA and ERISA. The Sixth Circuit Court of Appeals differs with Ernst & Young only as to evaluation of the stipulated facts concerning whether Simpson possessed the common-law attributes of partnership. Thus, in order to address the "Question Presented" in Ernst & Young's certiorari petition, the United States Supreme Court would be required to review

the stipulated evidence and reach contrary assessments than those affirmed by the United States Court of Appeals for the Sixth Circuit. Because the United States Supreme Court is not the appropriate forum to review the evidence, Ernst & Young's petition for certiorari should be denied. Further, the evidence strongly supports the consistent conclusions of the appellate and district courts.

In addition, the Sixth Circuit properly considered and followed legal precedent established by the Supreme Court of the United States to determine the issue of employee status under the ADEA and ERISA, and adopted an approach which is entirely consistent with that of every other circuit that has considered the issue. Indeed, the Sixth Circuit Court of Appeals reached the same holding as the United States Courts of Appeals for the Tenth, Eleventh, Eighth, and Ninth Circuits, as well as the District Court for the Southern District of New York, that all common-law indicia of partnership must be examined to determine if an individual labeled as a partner qualifies as an employee under the ADEA and ERISA. Ernst & Young's petition for certiorari raises no conflict among the circuits, no important public policy issue, and no issue of constitutional importance. The petition, therefore, should be denied.

III. THE PETITION FOR CERTIORARI SHOULD BE DENIED.

A. The Petition of Ernst & Young Raises Issues Which are Strictly Factual.

The "Question Presented" by Ernst & Young's certiorari petition raises no legal issue at all. Ernst & Young's exact issue is: "Whether a partner in a *bona fide* general partnership duly created under state partnership law,

who enjoys all of the rights of other partners under the partnership agreement, may sue as an 'employee' under ADEA and ERISA?" The Sixth Circuit Court of Appeals has already answered that issue, holding: "*bona fide* independent contractors and partners are employers, not employees; and as employers, neither come within the entitlement protection or coverage of either the ADEA or ERISA." Appendix A at 9a. Because the only legal issue presented by Ernst & Young has already been determined in its favor by the appellate court, no controversy of law exists for the Supreme Court of the United States to review. *See*, Supreme Court Rule 14(a). ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.") General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 177, 58 S. Ct. 849, 82 L.Ed. 1273 (1938). ("Our consideration of the case will be limited to the questions specifically brought forward by the petition.")

The only point on which the Sixth Circuit Court of Appeals disagrees with Ernst & Young is the factual assumption made by Ernst & Young in its "Question Presented" that Mr. Simpson possessed the powers and attributes of a *bona fide* general partner. As to that issue, the Sixth Circuit robustly rejects Ernst & Young's argument. Ernst & Young's request for certiorari review, therefore, must be denied because the issue presented is based upon a false factual premise that contradicts the evaluations of both the district and appellate courts. As this Court has long held: "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." General Talking Pictures, 304 U.S. at 178. *See also*, Supreme Court Rule 10. As stated by this Court in NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 503, 71 S. Ct. 453, 95 L. Ed 4799 (1951): "This is not the place to review

a conflict of evidence. . ." Further, all of Ernst & Young's arguments concerning partnership status, including its characterization of the stipulated facts regarding method of compensation, alleged capital contributions, voting rights and other issues, have been painstakingly reviewed and rejected by both the district and appellate courts. There is substantial evidence to support the consistent determinations of the reviewing courts. The conclusions of the district and appellate courts, based upon their review of the stipulated evidence, should not be distributed. General Talking Pictures, 304 U.S. at 178. Because no legal issue is raised by Ernst & Young's "Question Presented," and because the factual issues alleged have been thoroughly and properly considered by the district and appellate courts, certiorari review is inappropriate.

B. The Sixth Circuit Properly Interpreted the Statutory Provisions of the ADEA and ERISA and Correctly Followed Controlling United States Supreme Court Precedent.

The ADEA and ERISA provide protection against discrimination and interference with pension benefits for persons defined as an "employee." The only definition provided by statute of the term employee is "an individual employed by an employer." 29 U.S.C. §630(f); 29 U.S.C. §1002(6). In Hishon v. King & Spalding, 467 U.S. 69, 104 S.Ct. 2229 (1984), the United States Supreme Court held that partnerships are "employers" bound by the same laws prohibiting discrimination against employees as any other business entities.

While the United States Supreme Court recognizes "[t]here is nothing inherently inconsistent between the coexistence of a proprietary and an employment

relationship," Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 32, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961), courts faced with the issue have traditionally held that a person properly classified as a partner, or co-owner, is excluded from the definition of employee and thus not entitled to the protections of the various anti-discrimination acts. Appendix A at 9a. This analysis, that a person who demonstrates the common-law attributes of a partner is excluded from the definition of the word employee, has its origin at least in part in the concurring opinion by Justice Powell in Hishon, where he stated: "the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners." *Id.* at 79, 104 S.Ct. at 2236. Justice Powell added, however, in an oft-quoted footnote: "Of course, an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'" *Id.* at 79, n.2, 104 S.Ct. at 2236.

In Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 112 S.Ct. 1344 (1992), the United States Supreme Court determined that a person classified as an independent contractor would be excluded from the definition of "employee" under ERISA. The Court held: "we adopt a common-law test for determining who qualifies as an 'employee' under ERISA." *Id.* 112 S. Ct. at 1348. The Supreme Court identified at least a dozen factors to distinguish independent contractors from employees, in a non-exhaustive list which it derived from consideration of prior precedent regarding independent contractors, administrative rulings and a comparison to the Restatement (Second) of Agency. *Id.* In discussing the analysis of the evidence pursuant to these factors, the United States Supreme Court held: "Since the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer,... all of the incidents of the relationship

must be assessed and weighed with no one factor being decisive.'" Darden, 112 S.Ct. at 1349, quoting NLRB v. United Ins. Co. of America, 390 U.S. 254, 258, 88 S.Ct. 988, 991 (1968).

In affirming the judgment against Ernst & Young, the United States Court of Appeals for the Sixth Circuit carefully considered and followed these statutory provisions of the ADEA and ERISA as well as the legal precedent established by the United States Supreme Court. The Sixth Circuit agreed with Ernst & Young's contention that a person actually possessing the common-law characteristics of a *bona fide* general partner would be excluded from the definition of an employee under the ADEA and ERISA. Appendix A at 9a. *Accord*, Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977). The Sixth Circuit applied: "an analog of the Supreme Court's pronouncements in Darden to the record in this case" to establish a detailed, non-exhaustive list of common-law factors for determining partner versus employee status under the ADEA and ERISA. Appendix A at 9a. The Sixth Circuit relied upon the Uniform Partnership Act and prior legal precedent as its source for identifying various common-law attributes of partnership, just as the Supreme Court referenced prior legal precedent and the Restatement of Agency to identify common-law characteristics of independent contractors in Darden. In enumerating approximately a dozen illustrative factors to consider regarding the common-law attributes of partnership, the Sixth Circuit emulated the Supreme Court's construction of a similar list of common-law attributes of an independent contractor in Darden. The Sixth Circuit Court of Appeals did not attempt to artificially attribute weight or priority to any specific factor, again consistent with the holding of the Supreme Court in Darden that there is no magic, shorthand answer to the inquiry.

The Sixth Circuit Court of Appeals, therefore, did not depart from the usual and established course of judicial proceedings in upholding the judgment against Ernst & Young, (*Cf.* Sup. Ct. Rule 10(a)), nor did the Sixth Circuit decide an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court (*Cf.* Sup. Ct. Rule 10(c)). Instead, the Court of Appeals for the Sixth Circuit has conscientiously followed federal statutory law and the precedent established by the United States Supreme Court to distinguish partners from employees under the ADEA and ERISA.

C. The United States Circuit Courts of Appeals Agree That the Common-law Indicia of Partnership Must Be Examined to Determine if a "Partner" is an Employee for Purposes of the ADEA and ERISA.

The United States Courts of Appeals for the Eighth Circuit, Ninth Circuit, Tenth Circuit and Eleventh Circuit have each considered the identical issue raised in this petition for rehearing, and in each instance have reached the same legal conclusion as that of the unanimous Panel of this Court of Appeals for the Sixth Circuit: that determination of employee status under the ADEA or related statutes for an individual labeled as a partner must be done on a case by case basis upon review of the common-law attributes of partnership. In the most recent appellate opinion, Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78 (8th Cir. 1996), the Court of Appeals for the Eighth Circuit considered whether shareholders in a professional corporation were the functional equivalents of partners and therefore excluded from coverage under Title VII. The court held:

> The better reasoned cases hold that the substance of the employment relationship determines whether an individual is an employee under Title VII. . . . The actual duties and role of the individual govern the resolution of the issue. An employer may not avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship. [citations omitted].
>
> In deciding whether the shareholder-directors are employees or employers, we look to the extent to which they manage and own the business. . . . All relevant factors must be examined; any one may not be decisive in deciding whether an individual is an employee. . . A factor important to consider in evaluating the degree of management and control is the ability to participate in setting firm policy. Participation rights need not be equal, but the test is whether the shareholder-directors have a meaningful voice in decision-making. . . Indicia of ownership include such things as contributions to firm capital, liability for debts, and compensation based on profits.

Id. at 81.

Similarly, in Strother v. Southern California Permanente Medical Group, 79 F.3d 859, 867 (9th Cir. 1996), the Court of Appeals for the Ninth Circuit cited with approval the district court opinion herein [Simpson v. Ernst & Young, 850 F. Supp. 648 (S.D. Ohio, 1994), *aff'd*, 100 F.3d 436 (6th Cir. 1996)] and continued to hold:

> . . . determining whether an individual is an "employee" typically requires a factual inquiry which goes beyond merely the partnership agreement and

> the "partner" label. Courts must analyze the true relationship among partners, including the method of compensation, the "partner's" responsibility for partnership liabilities, and the management structure and the "partner's" role in that management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws.

Id.

The Court of Appeals for the Tenth Circuit agreed in Wheeler v. Hurdman, 825 F.2d 257 (10th Cir.), cert. denied, 484 U.S. 986 (1987), that the issue of whether an individual denoted a partner was to be considered an employee for ADEA purposes required a factual inquiry of the common-law attributes of partnership. Relying on the Uniform Partnership Act, which it noted is adopted in 48 states, the court identified traditional common-law indicia of partnership, including unlimited liability, the right to share in profits and firm management subject to agreement between the partners, the right and duty to act as an agent of the other, and shared ownership. *Id.* at 267. The court conducted a detailed review of the facts, and observed that the plaintiff effectively conceded *bona fide* partnership status. Wheeler, 825 F.2d at 261. While ultimately concluding under the facts presented the plaintiff did not qualify as an employee under the ADEA and Title VII, the court held:

> There may be circumstances not fairly covered by our holding excluding *bona fide* general partners from coverage under the Acts. The bundle of partnership characteristics we have identified may be lacking in important particulars, or there may be some deception which compromises the actuality of those

> characteristics. As Justice Powell noted; "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'" Hishon, 467 U.S. at 79, n.2, 104 S.Ct. at 2236, n.2. Those and similar circumstances expose the basic status of "*bona fide* general partner" to question and examination.

Wheeler, 825 F.2d at 277.

In Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 1400-1401 (11th Cir. 1991), the Eleventh Circuit Court of Appeals held, in assessing whether a member of a professional corporation qualified as a partner or an employee under the ADEA:

> We reject the exaltation of form over substance that resides in reliance on a label . . . We agree with this statement . . . :'[t]he definition of employee is not restrictive and must turn on the facts of a particular case.' [Citation Omitted].
>
> Consideration of the statutory language, the legislative history, and federal case law having reduced the issue to the single question "partner or employee", we look to the particular circumstances of the case at hand, . . . and, in so doing, we focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership. [Citations Omitted].

Id. at 1400-1401.

In addition, the Second Circuit Court of Appeals declined to grant interlocutory review of the opinion rendered by the Southern District of New York holding that a former "partner" of a Big Eight accounting firm could be considered an employee under the ADEA. *See*, Caruso v. Peat, Marwick Mitchell & Co., 779 F.Supp. 332, 333 (S.D.N.Y. 1991). The district court in Caruso identified three factors to examine in determining whether a "partner" was an employee under the ADEA: "(1) The extent of the individual's ability to control and operate his business; (2) The extent to which an individual's compensation is calculated as a percentage of business profits; and (3) The extent of the individual's employment security." Caruso v. Peat, Marwick Mitchell & Co., 664 F. Supp. 144, 149-150 (S.D.N.Y. 1987). The district court denied Peat, Marwick's motion for summary judgment on the employee issue, and the Second Circuit did not see a need to review this finding.

These holdings unquestionably demonstrate that the circuits are in agreement. The determination of whether a partner qualifies as an employee who is protected from discrimination depends upon whether the alleged partner possesses the common-law rights of partnership. Far from exhibiting a conflict, as contended by Ernst & Young, the opinions of these appellate courts demonstrate that they have carefully analyzed and deferentially relied upon the precedent from other circuits in reaching their conclusions. (*See e.g.*, citation by Sixth Circuit Court of Appeals to Eleventh Circuit opinion in Fountain, Tenth Circuit opinion in Wheeler and Southern District of New York opinion in Caruso, as authority for review of common-law indicia of partnership, Appendix A at 10a-11a; Citation by Ninth Circuit in Strother to Tenth Circuit opinion in Wheeler, Eleventh Circuit opinion in Fountain, Southern District of New York in Caruso and Southern District of Ohio opinion herein as

authority for review of common-law partnership factors Strother, 79 F. 3d at 866-67.) Indeed, only the factual underpinnings of these cases distinguish the results. Because no conflict exists among the circuits on this matter, Ernst & Young's petition for certiorari should be denied. *See*, Sup. Ct. Rule 10(a).

D. Ernst & Young Misconstrues Legal Precedent In an Attempt to Manufacture a Conflict Among the Circuits.

Faced with completely consistent opinions by the circuit courts of appeals and the federal district courts, Ernst & Young attempts to manufacture the appearance of a conflict by constructing heretofore nonexistent labels which it claims differentiate the approaches taken by the courts on the partnership issue. Ernst & Young's effort to conjure up a conflict deserves no credence. For instance, Ernst & Young describes the Eleventh Circuit as one which finds "organizational choice as dispositive" (Petition at 15-18), relying on Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982), to establish this proposition. This Court, however, reversed the Eleventh Circuit's opinion in Hishon. *See*, Hishon v. King & Spalding, 467 U.S. 69 (1984). Further, Ernst & Young's assertion that the Eleventh Circuit considers "organizational choice as dispositive" based upon the reversed opinion in Hishon cannot be squared with the holding of the Eleventh Circuit nine years later in Fountain, that: "we focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership." Fountain, 925 F. 2d at 1400-1401. Similarly, Ernst & Young labels the Tenth Circuit as exercising a "deferential assessment of factors." Petition at 19. Such a description hardly coincides

with the Tenth Circuit's holding in Wheeler, that the possibilities of deception or the lack of important partnership characteristics "expose the basic status of '*bona fide* general partner' to question and examination." Wheeler, 825 F.2d at 277.

Similarly, Ernst & Young misconstrues the opinion of the Second Circuit Court of Appeals in Hyland v. New Haven Radiology Associates, P.C., 794 F.2d 793 (2nd Cir. 1986), claiming it is authority for the proposition that organizational choice is dispositive. In actuality, the Second Circuit in Hyland refused to conduct any analysis that would restrict the application of the ADEA by reclassifying shareholder-members of a professional corporation as partners.[4] The court did not, however, conclude that it would refuse to analyze the facts concerning the common-law attributes of partnership to determine if a person labeled as a partner actually qualified as an employee under the ADEA. In fact, the Second Circuit denied interlocutory review of just such an opinion in Caruso, and permitted the holding that a "partner" could qualify as an employee to stand.

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[4]While it is true that the some circuits have been willing to analogize members of professional corporations to partners based upon a review of the common-law attributes of partnership, (See, e.g. the Eleventh Circuit opinion in Fountain and the Eighth Circuit opinion in Devine), and the Second Circuit has refused to conduct such an analysis, this issue is not presented to the Court by Ernst & Young's petition for certiorari because Ernst & Young was not a professional corporation. As discussed above, none of these circuits disagree on the issue before the court in this petition for certiorari, which is whether a person labeled a partner can be considered an employee if he lacks the common-law indicia of partnership.

Ernst & Young also champions Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977), as a case adopting a "deferential assessment of factors." Petition at 21. In Burke, the court never assessed any factors, but instead only determined in a motion to dismiss that in calculating the fifteen employee jurisdictional minimum, the term "employee" in Title VII excluded partners. Most courts accept this basic premise that persons properly classified as partners are not included within the protection of the Acts. Appendix A at 9a. The Seventh Circuit was not presented in Burke with the factual issue of whether a given individual with the title of partner lacks the common-law characteristics of partnership. Both the Sixth Circuit Court of Appeals and the district court expressly found Ernst & Young's reliance upon Burke misguided because the opinion did not address the issue of defining the characteristics of partner status. Appendix A at 11a, n. 3; Appendix C at 43a.

Ernst & Young also attempts to attach significance to the quantity of common-law indicia of partnership identified in each opinion, as if a court that gives more detail and specificity is in conflict with a court that makes a broader pronouncement. Ernst & Young's strain to prove this point is evident. It even claims that the Eighth Circuit was only "purporting to endorse an approach that examines 'all relevant factors'" (Petition at 22), when it held in Devine that: "All relevant factors must be examined; any one may not be decisive in deciding whether an individual is an employee." Devine, 100 F. 3d at 81. Ernst & Young also feigns confusion over factors identified by the Sixth Circuit such as employment security (which is specifically referenced in both Caruso, 664 F. Supp. at 149-150; and Wheeler, 825 F.2d at 274), the right and duty to act as agent of other partners (quoted directly from §9 of the Uniform Partnership Act in Wheeler, 825 F.2d at 267), and the fiduciary

relationship among partners (Uniform Partnership Act §43.) These factors, however, are well-supported in the common-law and consistent with those identified by other courts. Nor is the Sixth Circuit's inclusion of "the use of the term 'co-owners'" as a factor so baffling as suggested by Ernst & Young. To the contrary, the district court observed: "While labeling a person 'partner' does not make him so, the failure to term Simpson 'partner', when he had been thus denominated at Arthur Young, is an indication that he was not intended to be a partner." Appendix C at 54a. The district court apparently suffered no confusion in applying this criteria to the facts of the case.

Just as Ernst & Young's labeling of Mr. Simpson as a partner did not make him one, so too Ernst & Young's labeling of the circuits as in conflict does not a conflict make. Because the appellate courts consistently conclude that all relevant common-law aspects of partnership status must be reviewed to determine employee status under the ADEA and ERISA, Ernst & Young's petition for certiorari review should be denied.

E. The Sixth Circuit Committed No Error in its Analysis of Common-law Indicia of Partnership.

Contrary to Ernst & Young's contention, the analysis of the Sixth Circuit is not "too demanding" simply because the Sixth Circuit refused to accept as true the facade of partnership status erected by Ernst & Young. In an amazingly self-serving declaration, Ernst & Young asserts: "It should be enough, in a case such as this, for a partnership to demonstrate that (1) it is not a sham partnership . . . and that (2) the plaintiff enjoyed the rights of the other 'partners' in the firm." Petition at 25. This proposal, of course, conflicts with the holding in Darden that "all incidents of the

relationship must be assessed and weighed with no one factor being decisive." Darden, 112 S. Ct. at 1349. Not only does the law prohibit manipulation of the criteria which the court is permitted to consider, but also Ernst & Young cannot prove even these limited issues. As pertains to the sham partnership issue, the Court of Appeals found that: "the convoluted Partnership and U.S. Agreements . . . were calculated to create only an illusion that the firm's personnel were partners." Appendix A at 11a. As to Ernst & Young's assertion that Simpson enjoyed equal powers of other partners, the Sixth Circuit held that Simpson and other similarly situated parties "were relegated to the position of an employee subject to the virtually absolute, unilateral control of the Management Committee," Appendix A at 6a. Neither the law nor the facts support Ernst & Young's contention that the Sixth Circuit erred in finding Simpson to be an employee.

Thus unlike the plaintiffs in Devine and Wheeler, who failed to present evidence of their employee status, Simpson presented compelling evidence that he was not a *bona fide* general partner. (*Cf.* Devine, 100 F.3d at 82, Wheeler, 825 F.2d at 261). Simpson established by uncontroverted evidence that he had no right to participate in the management of the firm, and that sole power to manage the firm was vested in the Management Committee. Simpson had no right to vote on the members of the Management Committee, and no right to be informed of the Management Committee's decisions. The Management Committee determined the compensation of the parties in secrecy, with no relationship to any ownership interest in the firm. Simpson and his colleagues had no idea how much fellow parties were paid and no knowledge as to how the amounts were determined. He and others similarly situated were subject to termination by the Management Committee without

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No. 96-1553

In the Supreme Court of the United States

OCTOBER TERM, 1996

ERNST & YOUNG LLP, PETITIONER

v.

P. LARUE SIMPSON, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

We explained in the petition for certiorari that the jurisdictional issue presented in this case is a recurring and important question of federal law that arises in a wide array of contexts (Pet. 10-14); that the federal courts of appeals have reached conflicting results over what legal test governs this issue (Pet. 14-23); and that the Sixth Circuit's analysis is seriously flawed and will create intolerable uncertainty for the hundreds of thousands of accounting, law, medical and other service partnerships that do business in this country (Pet. 24-30). Respondent's submission is largely devoted to arguing that the jury was right to side with him on the *merits* of his claim that Ernst & Young discriminated on the basis of age — a point that is wholly irrelevant to the jurisdictional issue presented here. When respondent does finally get around to explaining why review should be denied, he has nothing persuasive to say. Respondent offers only the most perfunctory attempt to deny the critical importance of the issue presented, and his efforts to explain away the intercircuit conflict and to defend the Sixth Circuit's novel approach are completely unavailing. Further review is plainly warranted.

1. *Respondent's Threshold Arguments*. As an initial matter, respondent makes two arguments why review should be denied: (1) the question presented has already been answered in our favor; and (2) the issue is "strictly factual" or at least largely fact-bound. Br. in Opp. 11-13. Neither argument has merit.

Respondent's first contention (Br. in Opp. 10, 11-12) is based upon a purposeful misreading of the question presented. The issue for this Court's decision is whether a member of "a *bona fide general partnership*" who enjoys all the rights of other partners under the partnership agreement qualifies as an "employee" under the ADEA and ERISA. If the Sixth Circuit had answered *that* question in Ernst & Young's favor, there would have been no need for it to consider whether Simpson possessed "the characteristics of a *bona fide* general partner" (Br. in Opp. 10). It would have been enough that Ernst & Young was a *bona fide* general partnership valid under New York law (as it unquestionably was)

and that Simpson was afforded the same rights under the partnership agreement as every other Ernst & Young partner.[1]

Equally incorrect is respondent's suggestion that the issue presented is purely factual or largely fact-bound. If review is granted, the Court will need to resolve the threshold, purely legal question of what is the proper test for determining whether a nominal partner qualifies as an "employee" under ADEA and ERISA. The choice among competing approaches — the multifactor "common law" test created by the court below (Pet. 8, 24-25); the use of a much more limited list of "key attributes" of *bona fide* partners, as used in other circuits (see *id.* at 15, 19-21, 29-30); the test of whether an individual qualifies as a *bona fide* partner under the applicable state law, as the *amici* law and accounting firms propose (see Brief *Amici Curiae* for Sixteen Law Firms, at 12-20; Brief *Amici Curiae* for Arthur Andersen LLP, *et al.*, at 9-13); or the test that we set forth in the petition — is not dependent upon the facts of this case. It turns instead on an examination of statutory text and structure, legislative intent, background principles of partnership law, and other traditional legal materials.

Of course, once the Court resolves this threshold issue of statutory interpretation, it will face the question of how to apply the correct legal test to the facts of this case. But even if the Court were to perform that task itself, rather than remand to the court of appeals (as in *Darden*), it would not be required to resolve any factual disputes. As respondent elsewhere acknowledges (Br. in Opp. 2 n.3), the parties in this case "stipulated that no conflict of material fact existed" concerning Simpson's status as an

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[1] As we explained in the petition (at 25 n.18), the fact that Ernst & Young's partners delegated certain management responsibilities to *offices and governing committees* created under the partnership agreement does not detract from the conclusion that Simpson enjoyed all of the rights of other Ernst & Young partners under the agreement. There was nothing in the Ernst & Young partnership agreement, for example, that precluded Simpson from serving on the Advisory Council, the Management Committee, or even as chairperson of the firm. Nor is this a case involving different classes of partners (such as "equity" and "non-equity" partners).

"employee" or "partner," and the lower courts accordingly resolved the issue as a matter of law. Pet. App. 2a-3a.[2]

2. *The Vital Importance and Recurring Nature of the Issue Presented.* As we previously explained (Pet. 10-14), because the legal concept of "employee" is a pervasive one, the issue presented here arises with great regularity and affects the reach of an enormous number of important federal and state laws. Although respondent makes a half-hearted attempt to dispute this point, his arguments are completely unpersuasive. Thus, respondent makes the frivolous assertion that this case is not certworthy because it involves no issue of *constitutional* law. Br. in Opp. 27. Next, he maintains that the issue is "of no major precedential value because it was based upon a unique set of facts involving an illusory partnership." *Id.* at 28. Putting aside respondent's astonishing assertion that a firm that has operated in the partnership form (through its predecessor firms) for 90 years is "illusory," this argument is wrong because it focuses exclusively on the part of the decision below that applies the court's novel test to respondent and ignores the fact that the court first articulated a generally applicable legal rule for resolving the partner/employee issue. The Sixth Circuit's misguided test obviously has full precedential effect in future cases.

Finally, respondent suggests that this issue is no longer important *to Ernst & Young* because the firm now operates as a limited liability partnership (LLP). Br. in Opp. 28-29. Apart from the obvious fact that approximately $4 million is at stake in *this* litigation, the argument is wrong for at least two reasons. To begin with, Ernst & Young's conversion to an LLP hardly detracts from the importance of the issue to the hundreds of thousands of general partnerships in the services industry doing business in this country (or the millions of general partners who make up those partnerships). But more important, the argument significantly

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[2] Respondent makes much of the existence of two Ernst & Young partnership agreements. See Br. in Opp. 3-4. As we explained in the petition (at 3 n.1), however, that fact is irrelevant to the legal issue presented here. The two partnership agreements were created solely to comply with state accountancy laws; Simpson was a signatory to both agreements.

misstates the relevance of the change. The only difference between the two kinds of partnerships is that an LLP may — *consistent with state partnership law* — limit the liability of individual partners for the torts of other partners. It has nothing to do with their status as partners *vis-a-vis* one another.

3. *The Conflict and Confusion in the Courts of Appeals*. As explained in the petition (at 14-23), the courts of appeals have addressed the issue presented here in three different ways: (1) the Second and Eleventh Circuits treat as dispositive the organizational choice of co-venturers (whether partners or shareholders in a professional corporation); (2) the Seventh and Tenth Circuits accord substantial deference to organizational choice while examining, at most, a few key attributes of partnership status; and (3) the Eighth and Ninth Circuits focus on several attributes while affording no deference to the choice of organizational form. The Sixth Circuit has now joined the third group with a vengeance, ruling that courts must examine a lengthy list of factors supposedly derived from the common law and the UPA.

Although respondent labors mightily to explain away this deep and abiding conflict, his efforts are unavailing. Respondent concedes, as he must, that the Second Circuit in *Hyland* categorically "refused to conduct any analysis that would * * * reclassify[] shareholder-members of a professional corporation as partners." Br. in Opp. 22; see *Hyland*, 794 F.2d at 797-98 (holding that "the use of the corporate form precludes *any examination* designed to determine whether the entity is in fact a partnership") (emphasis added). According to respondent, however, *Hyland* (1) is distinguishable because it involved a professional corporation rather than a general partnership (Br. in Opp. 22 & n.4); and (2) was overruled by the Second Circuit's failure, in a later case, to grant leave to take an interlocutory appeal (*id.* at 20, 22). The first argument is wrong for the reasons stated in the petition (at 13); is contradicted by other portions of respondent's brief, where he relies on professional corporation cases such as *Devine* and *Fountain* and asserts that such cases "considered the identical issue raised in this petition" and "reached the same legal conclusion" as the court below (Br. in Opp. 16); is at odds with respondent's consistent reliance throughout this litigation on the professional corporation cases; and is incompatible

with virtually all of the relevant case law, which draws no distinction between general partnerships and professional corporations in setting forth the test for determining whether an individual is a *de facto* partner.

The second argument is silly: denial of leave to file an interlocutory appeal hardly represents a determination on the merits. In addition, even if it did, respondent has pointedly failed to mention the Second Circuit's later decision in *Johnson & Higgins*, which expressly reaffirmed the holding of *Hyland* and rejected as "without merit" the argument that it should ignore the organization's choice of form and instead evaluate whether particular individuals were *de facto* partners because of their actual role in the company in light of "common law" principles. 91 F.3d at 1538. The Second Circuit's cases are thus directly contrary to the Sixth Circuit's holding in this case. See also notes 5-6, *infra*.[3]

Respondent fares no better is seeking to explain away the Eleventh Circuit's contrary decision in *Hishon*. Respondent's assertion that this Court disagreed with the Eleventh Circuit's opinion in its entirety (Br. in Opp. 21) is plainly wrong for the reasons stated in the petition (at 17-18). Indeed, the Eleventh Circuit in *Fountain* acknowledged *Hishon*'s continuing validity in Title VII cases (see 925 F.2d at 1400). Although the Eleventh Circuit's adoption of a different approach in ADEA cases is puzzling and in our view erroneous, the court of appeals cannot be said to have overruled *Hishon*.

Equally unconvincing is respondent's attempt to explain away decisions of the Seventh and Tenth Circuits adopting an intermediate approach under which courts accord substantial deference to partners' choice of organizational form while examining a few key attributes of partnership status to ensure that

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[3] Respondent also hints that the definition of "employee" under the federal employment laws should turn on whether consideration of an individual's actual role "would restrict the application of the ADEA." Br. in Opp. 22. In other words, one definition would apply if it helps plaintiffs and another if it helps defendants. This unprecedented approach to statutory construction is "offensive to the principles of equality" (Br. in Opp. 27) respondent touts.

a partnership is not a sham. See Pet. 15, 19-21. Thus, respondent argues (Br. in Opp. 23) that the Seventh Circuit in *Burke* "never assessed any factors" concerning *bona fide* partner status, even though the court expressly noted, in ruling on the jurisdictional issue, that the partners involved "manage[d] and control[led] the business and share[d] in the profits and losses." *Burke*, 556 F.2d at 869. Respondent's related suggestion (Br. in Opp. 23) that the *Burke* court "was not presented * * * with the factual issue of whether a given individual with the title of partner" was indeed a *bona fide* partner — the same basis on which the Sixth Circuit sought to distinguish *Burke* — was anticipated and refuted in the petition (at 21 n.13) and has been rejected by courts and commentators alike.[4]

Moreover, as we explained in the petition (at 19-21 & n.12), the Tenth Circuit's decision in *Main Hurdman* is fundamentally at odds with the Sixth Circuit's decision in this case. Although respondent relies heavily on a snippet from the opinion in which the Tenth Circuit, in obvious dictum, referred to "circumstances not fairly covered by our holding" (825 F.2d at 277 (quoted in Br. in Opp. 18-19)), he makes no effort to explain how the result in *Main Hurdman* can possibly be reconciled with the result in this case. As we explained in the petition (at 21 n.12), the accounting partner in *Main Hurdman* was "functionally indistinguishable from Simpson." Respondent does not, and cannot, dispute this point.

In addition, respondent offers no persuasive rejoinder to our observation (Pet. 22-23 & n.15) that the Sixth Circuit's decision compounds the confusion by delineating a vastly expanded list of purported "common-law factors," which differ substantially from the factors used by other circuits. Respondent says only that the Sixth Circuit's factors are well-founded and they occasionally overlap with the factors used in other circuits. Br. in Opp. 23-24. Respondent's answer does not detract from our point.

Most remarkable of all, respondent categorically asserts that the Sixth Circuit's analysis is "entirely consistent with that of

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[4] See, *e.g.*, *Wheeler* v. *Main Hurdman*, 825 F.2d at 272 n.30; Zelman, *Civil Rights: Law Partners As Employees For Title VII Purposes?*, 35 U. FLA. L. REV. 201, 204 (1983).

every other circuit" and characterizes our discussion of the relevant case law as an attempt to "conjure up" the "appearance of a conflict." Br. in Opp. 11, 21. Suffice it to say that the intercircuit conflict has been recognized by at least 15 federal circuit judges,[5] 8 federal district and state appellate court judges,[6]

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[5] See, *e.g.*, *Devine*, 100 F.3d at 80 (Beam & Murphy, JJ.) (acknowledging that "courts have taken two approaches" to this issue and expressly declining to follow the Second Circuit's approach in *Hyland* and *Johnson & Higgins*); *id.* at 82 (Heaney, J., dissenting) (stating that he agrees with the rule of the Second Circuit in *Hyland*); *Johnson & Higgins*, 91 F.3d at 1537-38 (Cabranes & Miner, JJ.) (citing decisions of other circuits with "but see" signal); *Strother* v. *Southern California Permanente Medical Group*, 79 F.3d 859, 867 n.9 (9th Cir. 1996) (Bright, Skopil & Wiggins, JJ.) (citing *Hyland* with "cf." signal); *Fountain*, 925 F.2d at 1400, 1401 (Fay, Cox, & Markey, JJ.) (expressly "reject[ing]" the Second Circuit's approach in *Hyland); Main Hurdman*, 825 F.2d at 264 (Barrett, Logan & Anderson, JJ.) (noting that Second Circuit has "taken an opposite view" on issue from that of another circuit); *Hyland*, 794 F.2d at 797-98 (Pratt & Miner, JJ.) (expressly disagreeing with Seventh Circuit's view that court should examine a few essential factors in assessing whether an individual is a *de facto* partner).

[6] See *Godeau* v. *Dental Health Services, Inc.*, 901 F. Supp. 1139, 1142-43 & n.7 (M.D. La. 1995); *Johnson* v. *Cooper, Deans & Cargill, P.A.*, 884 F. Supp. 43, 45 (D.N.H. 1994); *Wright* v. *Kosciusko Medical Clinic*, 791 F. Supp. 1327, 1329 (N.D. Ind. 1992); *Gorman* v. *North Pittsburgh Oral Surgery Associates, Ltd.*, 664 F. Supp. 212, 213-214 (W.D. Pa. 1987); *Jones* v. *Baskin, Flaherty, Elliot & Mannino, P.C.*, 670 F. Supp. 597, 601 (W.D. Pa. 1987), aff'd without op., 897 F.2d 522 (3d Cir.), cert. denied, 498 U.S. 811 (1990); *Fleming* v. *Lentz, Evans & King, P.C.*, 873 P.2d 38, 41 (Colo. Ct. App. 1994).

and numerous commentators.[7] If the conflict that we contend exists is an illusion, it is one that is widely shared.

4. *The Error in the Court of Appeal's Analysis.* On the merits, respondent offers three arguments in defense of the opinion below. First, respondent maintains that this Court's decision in *Darden* mandates the application of a multifactor common-law test for deciding whether a member of a general partnership qualifies as an "employee." Br. in Opp. 24-25, 27. That argument was anticipated and refuted in the petition (at 28-29). What respondent fails to appreciate is that, in distinguishing "employees" from "independent contractors," there is no practical alternative to looking at the facts of each employment relationship; in the partnership context, by contrast, it is a simple matter to see whether a person has the same rights as all of the other partners in a *bona fide* partnership.

Second, respondent takes issue with the argument that the parties to a partnership agreement "can reach any agreement they wish" and that "the Uniform Partnership Act contains nothing but default provisions." Br. in Opp. 26. But we never made such a sweeping claim. Instead, we said that the UPA's default provisions are "largely subject to alteration by the partnership agreement" and could be altered by the parties subject to "certain limited exceptions." Pet. 26. Notably, respondent does not dispute that many of the UPA provisions enumerated by the Sixth Circuit as essential attributes of partner status can be freely altered

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[7] See Pet. 14-15 (citing and quoting articles by four commentators). See also Ferguson, *Partners As Employees Under The Federal Employment Discrimination Statutes: Are The Roles Of Partner And Employee Mutually Exclusive?*, 42 MIAMI L. REV. 699, 710-21 (1988); *id.* at 700-01 (explaining that "courts have struggled with the issue" and "[c]onsiderable uncertainty remains"); Narducci, *The Application Of Antidiscrimination Statutes To Shareholders Of Professional Corporations*, 55 FORDHAM L. REV. 839, 848-49 (1987) (acknowledging conflict); Phillips, Wheeler v. Main Hurdman*: Partners Are Not Protected Under Title VII Or The ADEA*, 25 HOUS. L. REV. 1179, 1188-1202 (1988) (same); Zelman, *supra*, 35 U. FLA. L. REV. at 202-07 (1983) (same); Freedman, *Discharging Law Firm Partners*, 7 LEGAL ECON. 37, 39 (1989) (acknowledging divergence in approaches taken by federal courts).

by the parties to a partnership agreement. If not a confession of error, that concession at minimum speaks volumes about the need for further review of the decision below. See also Ferguson, *supra*, 42 MIAMI L. REV. at 704 (explaining that UPA "fails to provide definitive guidance for determining whether partners should be considered employees" because "partners may override the UPA's provisions by entering into a written agreement"); Pokora, *Partners As Employees Under Title VII: The Saga Continues*, 22 OHIO N.U.L. REV. 249, 271 (1995) (same).

Third, although respondent does not say so explicitly, his extensive discussion of the *merits* of his age discrimination claim is reminiscent of a theme he sounded repeatedly in the courts below: Simpson may sue as an "employee" because he was susceptible to, and suffered, the very sort of conduct that the ADEA is meant to forbid. Unfortunately for respondent, this argument conflates the jurisdictional issue presented here with the merits; and it is completely circular, because if Simpson is properly excluded from ADEA's coverage, then there is no *federal* law prohibition on any conduct by Ernst & Young that was based on Simpson's age (and any legal recourse Simpson might have would be exclusively under *state* law, see Pet. 24 n.17).

In any event, "susceptibility" is hardly a plausible basis for deciding whether an individual is an "employee" under the federal employment discrimination laws. Obviously, workers in firms that have fewer than 15 employees are *susceptible* to adverse employment actions on the basis of impermissible considerations, yet they are not covered by Title VII or ADEA. Pet. 12. The same can be said for independent contractors. See *Main Hurdman*, 825 F.2d at 275. Indeed, even the most powerful partner in a large nationwide partnership like Ernst & Young (such as a member of the Management Committee) is surely "susceptible" to adverse actions taken by other partners. In short, susceptibility to discrimination is "not a test of employee status at all, but rather is a waiver of the requirement that the worker be an employee for coverage under Title VII." Phillips, *supra*, 25 HOUS. L. REV. at 1190; *Main Hurdman*, 825 F.2d at 275 (rejecting argument that "discrimination itself defines the application of the Acts" on ground that it would "transform the employment discrimination statutes into business discrimination statutes").

As the *amicus* briefs filed in support of the petition explain, the Sixth Circuit's decision threatens devastating consequences for the many law, accounting, and other professional services firms that have chosen for decades to do business in the partnership form.[8] These firms should not be confronted with the possibility of a massive restructuring of their operations in order to avoid liabilities under ERISA and a host of other statutes without a definitive ruling of this Court.

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[8] The accounting firm *amici* urging this Court to grant review include, in addition to Arthur Andersen LLP, the following: Coopers & Lybrand L.L.P., Deloitte & Touche LLP, KPMG Peat Marwick LLP, and Price Waterhouse LLP. The law firm *amici* asking this Court to review the Sixth Circuit's decision include Arnold & Porter; Davis Polk & Wardwell; Dickinson, Wright, Moon, Van Dusen & Freeman; Fried, Frank, Harris, Shriver & Jacobson; Fulbright & Jaworski L.L.P.; Jones, Day, Reavis & Pogue; King & Spalding; Latham & Watkins; O'Melveny & Myers, LLP; Paul, Hastings, Janofsky & Walker LLP; Seyfarth, Shaw, Fairweather & Geraldson; Shearman & Sterling; Skadden, Arps, Slate, Meagher & Flom LLP; Vorys, Sater, Seymour and Pease; Weil, Gotshal & Manges LLP; and Wiley, Rein & Fielding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ERNST & YOUNG LLP,

Petitioner,

vs.

P. LaRUE SIMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

OPPOSITION OF RESPONDENT P. LaRUE SIMPSON TO MOTIONS FOR LEAVE TO FILE AMICI BRIEFS

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INTRODUCTION

Respondent P. LaRue Simpson respectfully requests that this Court deny the motions of the Big Six Accounting Firms [Arthur Anderson {sic.} et. al.] and Sixteen Law Firms [Arnold & Porter, et. al.] for leave to file amici curiae briefs. Simpson refused consent to these entities to file amici curiae briefs. Because Simpson has withheld consent, the motions for leave to file amici briefs are not favored. Supreme Court Rule 37(2)(b). Simpson denied consent to the alleged amici because they are not neutral, disinterested parties who are poised to provide assistance to the court. Instead, the alleged amici are biased entities which are professionally and financially aligned with Ernst & Young.

None of the proposed amici possess any information relevant to Simpson's employee status under the ADEA and ERISA. Further, the briefs of the proposed amici curiae grossly misconstrue the opinion of the United States Court of Appeals for the Sixth Circuit. They fail to cite the prior opinion of the United States Supreme Court in Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) and contain no analysis of Nationwide Insurance Co. v. Darden, 503 U.S. 322, 112 S.Ct. 1344 (1992). Adoption of their arguments would, however, require the United States Supreme Court to overrule both opinions. The briefs submitted by the proposed amici also disregard the deceptive and discriminatory misconduct of Ernst & Young. The alleged amici burden the United States Supreme Court with hyperbolic rhetoric and distorted legal analysis. The motions for leave to file amici briefs should be denied.

I. THE PROPOSED AMICI ARE FRIENDS OF ERNST & YOUNG, NOT FRIENDS OF THE UNITED STATES SUPREME COURT.

A true amicus curiae appears as a "'friend of the court', as distinguished from an advocate before the court." Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974). Courts refuse to extend amicus curiae status to one with an interest in the litigation, or to one who appears to be an advocate for a party to the litigation. Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65 (D.N.J. 1993). An amicus curiae provides a benefit to the court only if it encourages an "objective, dispassionate, neutral discussion of the issues." United States v. Gotti, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991). If it is apparent that the proposed amicus curiae comes before the court not as a neutral party, but rather as an advocate for one side, then the alleged amicus "does the court, itself and fundamental fairness a disservice." Id.

Far from being neutral, the entities which petition the United States Supreme Court to appear as amici curiae in this litigation have a direct professional or financial affinity with Ernst & Young. Many of the sixteen law firms that join in the Arnold & Porter brief appear frequently as Ernst & Young's litigation counsel in cases throughout the United States. Paul, Hastings, Janofsky & Walker, for example, represented Ernst & Young in 1996 in litigation before the United States Court of Appeals for the Ninth Circuit. *See*, Fidel, et.al. v. Young, et. al., 1996 U.S. App. LEXIS 24422. Weil, Gotshal & Manges LLP, Davis Polk & Wardwell, and Fried Frank, Harris Shriver & Jacobsen all appear routinely as counsel for Ernst & Young LLP. (*See*, Exhibit 1, documentation of case captions and counsel indicating representation

of Ernst & Young by alleged amici law firms). Dickson, Wright, Moon, VanDusen & Freeman lists Ernst & Young as a major client in Martindale-Hubbel. (See, Exhibit 2). In a recent interview with the National Law Journal, Ernst & Young General Counsel Kathryn Oberly described how she prefers to spread Ernst & Young's litigation among numerous outside law firms. She identified purported amici Davis Polk & Wardwell and Lantham & Watkins as particular favorites, "with which we have long term relationships." (*See* Exhibit 3, February 17, 1997 National Law Journal article at B3). The purported amici law firms therefore are not neutral, disinterested entities. Instead, they have a direct financial interest in lending support to Ernst & Young, their valuable and well-paying client.

Similarly, the accounting firms who join the Arthur Anderson {sic.} petition filed by Gibson Dunn & Crutcher, constitute, in conjunction with Ernst & Young, the Big 6 of international accounting practice. They frequently appear as codefendants in major lawsuits, such as the California Savings & Loan litigation referenced above. (*See*, Fidel v. Young, 1996 U.S. App. LEXIS 24422.) Moreover, they habitually join to support one another in amici petitions, such as the one filed herein. For example, in Plaut, et.al. v. Spendthrift Farm, Inc. et. al., 1 F.3d 1487 (6th Cir. 1993), *aff'd* 514 U.S. 211, 115 S. Ct. 1447 (1995), proposed amici Deloitte, Haskins & Sells, along with their present counsel, Gibson, Dunn & Crutcher, were named as co-defendants in a securities fraud action involving a thoroughbred horse farm. Kathryn Oberly, General Counsel for Ernst & Young, filed an amicus curiae brief in their support, just as Gibson Dunne & Crutcher has done for Ernst & Young herein. Joining in the Ernst

& Young amici brief were proposed amici Arthur Andersen & Company, KPMG Peat Marwick and Price Waterhouse. (*See*, Ex. 4). In Axel Johnson Inc. v. Arthur Andersen & Co., 6 F.3d 78 (2nd Cir. 1993), Gibson, Dunn, & Crutcher and Deloitte & Touche returned the favor by rallying to Arthur Andersen's aid, with Gibson, Dunn & Crutcher filing an amici brief on Arthur Andersen's behalf as counsel for Deloitte & Touche. Ernst & Young and KPMG Peat Marwick joined their friends in this petition. The Big 6 accounting firms have joined forces on other amici briefs as well. (See, Exhibit 4, Ceres Partners v. GEL Associates, et. al., 918 F.2d 349 (2nd Cir. 1990) (Ernst & Young filed a joint amici curiae brief on behalf of itself, Coopers & Lybrand, Peat Marwick Main & Co. and Price Waterhouse); The Florida Bar Re: Advisory Opinion, 613 So. 2d 426 (Fla. 1992) (Joint amici brief submitted by Arthur Andersen & Co., Coopers & Lybrand, Deloitte & Touche, Ernst & Young, KPMG Peat Marwick and Price Waterhouse); Richards Auto City, Inc. v. Director, Division of Taxation, 659 A.2d 1360 (N.J. 1995) (Joint amici brief submitted by Ernst & Young, Coopers & Lybrand and Deloitte & Touche); Checkosky, et. al. v. SEC, 23 F.3d 452 (D.C. Cir. 1994) (Kathryn Oberly, General Counsel of Ernst & Young submitted joint amici brief on behalf of Arthur Andersen & Co., Deloitte & Touche, Ernst & Young and KPMG Peat Marwick.)) This pattern of concerted activity belies the contention of the proposed amici that they seek to provide neutral, dispassionate assistance to the Court.

In addition, most of the Big 6 accounting firms have participated in mergers comparable to that whereby Arthur Young and Ernst & Whinny merged to create Ernst

& Young LLP, such as the merger of Deloitte, Haskins & Sells with Touche, Ross to create Deloitte and Touche LLP, or the merger of Klynveld Main Goerdler (KMG) Main Hurdman with Peat Marwick & Mitchell to create KPMG Peat Marwick LLP. (*See* Generally, Stephens, Mark, *The Big Six, The Selling Out of America's Top Accounting Firms*, Simon & Schuster, 1991). Extensive reductions in partner ranks routinely follow such events. Stephens describes the purging of partners which occurred at Deloitte, Haskins & Sells and KPMG Peat Marwick after their mergers, in order to preserve "slots for new partners. . . the lifeblood of the firm." Stephens, *The Big Six* at 172-173. Ernst & Young's Management Committee Member Jesse Miles used the exact same phrase, about protecting the "lifeblood of the organization," as his justification for analyzing Ernst & Young partners by age in order to select older persons for termination. (Record, Vol. XI at 1051, Tr. 5/2/94 at 1051). Many of these proposed amici firms have been sued in the past for age discrimination by "partners." (*See*, e.g. Wheeler v. Hurdman, 825 F.2d 257 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987) (predecessor to KPMG Peat Marwick; Caruso v. Peat, Marwick & Mitchell, 664 F. Supp. 144 (S.D.N.Y. 1987). They have a direct interest in assisting Ernst & Young in achieving dispensation for its illegal actions, because they perceive that they too will be protected by a rule of law that prohibits scrutiny of their conduct.

Thus the law firms and accounting firms who seek leave to appear as amici curiae are actually friends of Ernst & Young, not friends of the Court. So eager are they to rally around their fallen comrade, "like the cavalry riding belatedly to the

rescue" Lane v. First National Bank of Boston, 871 F.2d 166 (1st Cir. 1989), that they fail to disclose to the Court their own pecuniary interests and professional interrelationships with Ernst & Young. The proposed amici do "fundamental notions of fairness a disservice" by cloaking their fraternal affiliations with Ernst & Young under the guise of disinterested, neutral advisors to the Court.

Ernst & Young already is well represented by Mayer, Brown & Platt, Dinsmore & Shohl and in-house counsel. Supplemental assistance is hardly needed to articulate the position of Ernst & Young, the self-proclaimed "largest integrated professional services firm in the nation." (Exhibit 3 at B1). Under these circumstances, where the proposed amici are biased advocates, the party they seek to assist is well represented, and consent to appear as amici curiae has been refused, amici curiae status should not be granted. *See*, Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970).

II. THE PROPOSED AMICI CURIAE SUBMIT MISLEADING AND INACCURATE LEGAL ANALYSIS TO THE UNITED STATES SUPREME COURT.

A. The Sixth Circuit Court of Appeals defined the term "employee," not the term "partner."

Contrary to the position of the alleged amici curiae, the Sixth Circuit of Appeals did not create a new federal law of partnership. Instead, the Court of Appeals for the Sixth Circuit construed the term "employee" as utilized in the ADEA and ERISA. The Sixth Circuit scrutinized plaintiff's position in the firm to see if he was excluded from the definition of "employee" by virtue of possessing the common law attributes of a *bona fide* general partner. Drawing a comparison to the law excluding independent contractors from employee status, the Sixth Circuit noted that "*bona fide* independent

contractors and partners are employers, not employees; and as employers, neither come within the entitlement protection or coverage of either the ADEA or ERISA." (Appendix A at 9a.) In adopting this analysis, the Sixth Circuit followed the holding of the United States Supreme Court in Nationwide Insurance Corp. v. Darden, 503 U.S. 318, 112 S.Ct. 1344 (1992) and concurred with the reasoning of the United States Courts of Appeals for the Tenth Circuit, Eleventh Circuit, Ninth Circuit, and Eighth Circuit (and implicitly approved by the Second Circuit) in similar cases.

B. The Sixth Circuit reviewed the stipulated evidence to determine if Simpson possessed the common law attributes of a *bona fide* general partner or an employee.

"Applying an analog of the Supreme Court's pronouncements in Darden to the record in this case," (Appendix A at 9a) the Sixth Circuit determined that:

> the promoters of the Ernst & Young merger had wilfully devised a management structure which was, from its very inception, designed to preclude Simpson and his similarly situated associates from any *bona fide* ownership interest, fiduciary position, management control, voting rights and privileges, share in the profits, and meaningful vote in firm decisions, including decisions involving job security. Moreover, by threatening vigorous enforcement of a "non-compete clause" against Simpson to embrace "all clients or potential clients" of Ernst & Young, which had become one of the world's largest professional service firms, defendant effectively foreclosed Simpson from pursuing his profession as a CPA for two years.

Appendix A at 11a-12a.

Thus the analysis of the stipulated evidence by the Sixth Circuit established that Ernst & Young engaged in intentional misrepresentation in accomplishing the merger, and that Ernst & Young exercised a power of coercion against "partners" whom they

could terminate without cause and threaten with a non-compete. The assumption of the would-be amici that the creation of Ernst & Young occurred by a voluntary agreement among persons of equal standing ignores this clear determination by the appellate court.

Further, despite the rhetoric of the alleged amici, the opinion of the Sixth Circuit has no bearing upon the conduct of partnerships under the laws of each state. The Sixth Circuit did not find Simpson to be an employee because Ernst & Young had centralized management. The Sixth Circuit found Simpson to be an employee because he had no right to participate in selection of the management, no authority to know what the management was doing, and no power to protect himself from management committee decisions that were devastating to his interest. Ernst & Young's operations presented a unique factual situation to the Sixth Circuit. Only entities intentionally scheming to strip "partners" of the true rights and privileges of ownership need fear the results of this case. Certainly, none of the alleged amici have altered their conduct in the aftermath of the Sixth Circuit opinion, nor did they so react after the opinion of the district court.

Nor does the opinion have tax law implications. In fact, the Internal Revenue Service recognizes that it adopts a definition of partnership that "is broader in scope then the common law meaning of partnership and may include groups not commonly called partnerships." 26 CFR §301.7701-3(a). Further, the creation of entities such as limited liability partnerships has no relationship to the opinion by the Sixth Circuit. The opinion only considered the distinction between "employee" and *bona fide* general

partners for the purposes of the ADEA and ERISA. The court did not address, nor has any court ever addressed, the applicability of the ADEA and ERISA to members of a limited liability partnership.

C. The United States Supreme Court would be required to overrule its prior opinions in Community for Creative Non-Violence v. Reid and Nationwide Insurance Co. v. Darden in order to adopt the arguments of the alleged amici curiae.

The purported amici curiae argue that the United States Supreme Court is bound by the law of each of the fifty states in determining whether an individual is an "employee," as opposed to a *bona fide* general partner, under federal statutory law. They argue that the Sixth Circuit erred in relying upon the Uniform Partnership Act to develop federal common law criteria to distinguish between employees and partners when interpreting the term "employee" under the ADEA and ERISA. In Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), the United States Supreme Court held exactly the opposite. The Supreme Court noted its past practice of interpreting the term "employee" in federal statutes in accordance with the common law. In a unanimous opinion, the United States Supreme Court held:

> In past cases of statutory interpretation, when we have concluded that Congress intended terms such as "employee," "employer" and "scope of employment" to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms. [Citations omitted]. This practice reflects the fact that 'federal statues are generally intended to have uniform nationwide application.' Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43, 109 S.Ct. 1597, 1605, 104 L.Ed.2d 29 (1989). Establishment of a federal

> rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common law copyright regulation. See 17 U.S.C.§301 (a). We thus agree with the Court of Appeals that the term "employee" should be understood in light of the general common law of agency.

Id. at 2173. The Supreme Court applied this general common law standard to define the term "employee" under the Copyright Act of 1976, and relied upon the Restatement of the Law of Agency to identify the common law factors. Reid, 109 S.Ct. at 2179.

This holding was reaffirmed and relied upon by the United States Supreme Court in the unanimous opinion delivered by Justice Souter in Nationwide Insurance Co. v. Darden, 503 U.S. 318, 112 S.Ct. 1344, (1992). In Darden, the Court adopted a federal common law test for defining "employee" under ERISA, based upon the common law test developed in Reid. The United States Supreme Court held: "As in Reid, we construe the term [employee] to incorporate 'the general common law of agency, rather than ... the law of any particular State.'" Darden, 503 U.S. at 323, n.3, 112 S.Ct. at 1348, n.3, quoting Reid v. Community for Creative Non-Violence. The Supreme Court holding in Darden directly contradicts the position of the alleged amici, who insist that the Supreme Court apply the law of each state to define "employee" under ERISA.

The purported amici curiae omit analysis of the holdings in Reid or Darden in their briefs. (The Big 6 Accounting firms cite neither case; the sixteen law firms make only one oblique reference to Darden.) Instead, the proposed amici cite Kamen v.

Kemper Financial Services, 500 U.S. 90, 111 S.Ct. 1711 (1991), as alleged authority requiring the application of state law to define "employee" under federal statutes. The opinion of the United States Supreme Court in Kamen, however, does not even address the issue of defining a term in a federal statute. Instead, Kamen concerns creation of a common law rule to effectuate a private cause of action under a federal statute. Kamen involved a specific situation wherein the appellate court adopted a rule (abolishing the demand futility exception in shareholder derivative actions) to effectuate a private cause of action under federal statute, which contradicted the requirements of many state courts.

No comparable situation is presented here. The Sixth Circuit Court of Appeals defined a term in a federal statute; it did not create a common law rule to "fill the interstices of a federal remedial scheme." Id. at 97, 111 S.Ct. at 1717. In addition, the Sixth Circuit Court of Appeals relied upon the Uniform Partnership Act, adopted by forty-eight states, to determine common law criteria distinguishing employees from *bona fide* general partners. It did not adopt common law factors which contradicted existing state law. Kamen therefore has no legal or factual applicability to this case.

In addition, the alleged amici urge reliance upon De Sylva v. Ballentine, 351 U.S. 570, 76 S. Ct. 974, (1956). Over a strong dissent, the Supreme Court in De Sylva held that the definition of "children" entitled to renewal rights under the federal Copyright Act should be determined by reference to state law, particularly because the matter of domestic relations was "primarily a matter of state concern." Id. at 580. The alleged amici urge the Court to rely upon this 1955 case interpreting the term

"children" under the Copyright Act, even though the holding is easily distinguishable based upon the unique state interest in family law. Simultaneously, the alleged amici disregard the unanimous 1989 decision in Reid defining "employee" under the Copyright Act. Such an argument appears disingenuous when "employee" is the exact term at issue in this case. Further, the alleged amici offer no analysis of Darden, which is the controlling United States Supreme Court precedent establishing that "employee" is to be given a federal common law definition under ERISA. Again, when definition of "employee" under ERISA is the precise issue at stake in this litigation, the decision of the alleged amici to ignore Darden is inexplicable.

Far from "bring[ing] to the attention of the Court relevant matter not already brought to its attention by the parties," Supreme Court Rule 37(1), the alleged amici curiae offer to assist this Court by concealing controlling precedent and arguing irrelevant case law. Acceptance of their argument would require the United States Supreme Court to overrule the reasoning of two recent Supreme Court opinions. The decision by counsel for the alleged amici to cite easily distinguishable authority, while omitting analysis of controlling United States Supreme Court precedent, raises serious concerns of whether their conduct is "unbecoming a member of the Bar of this Court." Supreme Court Rule 8(1). Certainly, in terms of a proposed amici curiae brief, such legal analysis is not helpful to the court and should be disallowed. *See*, Gotti, 755 F. Supp. at 1158.

D. Ernst & Young argued throughout this litigation for the court to deny Simpson employee status based upon analysis of the common law criteria of *bona fide* general partnership.

Throughout the proceedings before the district and appellate courts, Ernst & Young urged reliance upon Darden and the common law criteria of partnership. Ernst & Young cited to the Uniform Partnership Act and to law of New York, (the law designated as controlling in the Ernst & Young Agreement of the Parties - U.S) in its motion for summary judgment. Ernst & Young observed that New York: "adopted the Uniform Partnership Act in 1919 with modifications not relevant for purposes of this action. The New York Partnership Act adopted the U.P.A. definition of partnership without modification." Record 163 at 1825, Defendant's Second Motion for Summary Judgment at 14; *See* also Id. at 21. ("An essential of a partnership, either under common law rule or under Section 11 of the New York Partnership statute, is ... [unlimited liability for the actions of a partner]"). The Sixth Circuit noted that it was: "Applying an analog of the Supreme Court's pronouncements in Darden to the record in this case, as suggested by Ernst & Young ...," when it determined that Simpson was an employee, rather than a *bona fide* general partner. Appendix A at 9a.

Ernst & Young of course never raised as error in its petition for certiorari the fact that the appellate court accepted its argument to follow Darden and analyze Simpson's status as an "employee" based upon review of the common law attributes of *bona fide* general partnership. Ernst & Young undoubtedly knew, however, of this argument at the time it filed its certiorari petition because Eleven law firms represented by the same counsel as the Sixteen Law Firms herein (Kathleen Burke of Jones, Day,

Reavis & Pogue), appeared as amici curiae in the appellate court to make the same argument. (*See*, Brief for Eleven Law Firms As Amici Curiae In Support of Appellant [Ernst & Young], (6th Cir. 95-3209) filed July 31, 1995).

In short, the proposed amici raise an issue which the petitioner knowingly chose not to advocate in its petition for certiorari and which contradicts the arguments made by the petitioner before the district, appellate and United States Supreme Court. Absent exceptional circumstances, proposed amici curiae will not be permitted to raise issues which the petitioner waived. *See*, Christopher M. v. Corpus Christi Independent School District, 933 F.2d 1285 (5th Cir. 1991); Richardson v. Alabama State Board of Education, 935 F.2d 1240 (11th Cir. 1991). Nor may alleged amici curiae usurp the prerogative of a party by introducing new issues which the party elected not to pursue. State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, *cert. denied*, 115 S.Ct.298, 130 L.Ed.2d 211 (1994). "Amici are allowed to participate on appeal in order to assist the court in achieving a just resolution of issues raised by the parties. We know of no authority which allows an amicus to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore." Lane, 871 F.2d at 175. It is particularly abhorrent to fundamental fairness for alleged amici curiae to claim as error a legal analysis which was urged by the party they support. The asserted amici, as in Gotti, do "the court, itself and fundamental notions of fairness a disservice." Gotti, 755 F.Supp.at 1159.

E. The proposed amici curiae identify no difference between state law and the common law of partnership which would alter the analysis of Simpson's employee status.

Even if federal law required this Court to apply state law to define a term in a federal statute, [which is erroneous], no error would have occurred herein because the law of New York and the Uniform Partnership Act are identical. Ernst & Young concedes this point. Record 163 at 1825, Defendant's Motion for Summary Judgment at 14). Further, as noted in Wheeler, forty-eight states adopt the Uniform Partnership Act. Wheeler, 825 F.2d at 257. The alleged amici identify no distinction between any state's law and the Uniform Partnership Act. Instead, they merely reargue the flawed position of Ernst & Young that the parties can "agree" to anything and still call the result a partnership. In precise mimicry of Ernst & Young, the professed amici describe the mandatory provisions of the Uniform Partnership Act, such as the right of access to the books and records of the firm, the obligation to disclose on demand all material things affecting the partnership, and the creation of a fiduciary duty among partners, as "default provisions." They exalt the "voluntary agreement" by Simpson to the terms of the Ernst & Young documents, ignoring that the Sixth Circuit specifically found them to be the result of coercion, deception and misrepresentation by Ernst & Young. The Court has heard all these arguments before. They are exactly the same arguments made by Ernst & Young. No purpose is served by burdening this Court with two alleged amici briefs which merely parrot the contentions of the petitioner. *See*, Gotti, 755 F. Supp. at 1158. Leave to submit the proposed amici briefs should therefore be denied.

F. No court has ever ruled that limited liability partners are excluded from the definition of "employee" under the ADEA and ERISA.

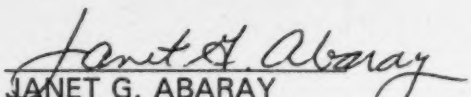
The only issue before this Court on Ernst & Young's petition for certiorari is whether Simpson possessed sufficient characteristics under the common law of a *bona fide* general partner to exclude him from the definition of employee under the ADEA and ERISA. The alleged amici anxiously leap to the assumption that limited liability partners are excluded from the definition of "employee" under the ADEA and ERISA as well. The federal courts, however, have never addressed this issue. Nor is the issue presented in Simpson's case, because Ernst & Young did not restructure to claim limited liability partnership status until after the Simpson verdict. The alleged amici who claim limited liability partnership status (which includes all the accounting firms in the Anderson {sic} petition, and five of the sixteen law firms, as well as Ernst & Young) have no interest in the outcome of this petition for certiorari because none of them are general partnerships. Leave to claim amici curiae status should not be granted to entities with such a tangential interest in the outcome of the litigation.

III. CONCLUSION

The proposed amici curiae come to this Court exposed as biased advocates. They impose upon this United States Supreme Court to urge adoption of a rule of law which would require this Court to overrule controlling precedent, which they neglect to discuss. They take a position which contradicts that urged by the petitioner over the course of six years of litigation. Simpson respectfully suggests that the actions of the alleged amici have increased the burden upon the litigants and caused an

unnecessary complication of this litigation. The parties have vigorously issued the actual issues of this case to exhaustion. Justice is not served by delaying plaintiff's judgment in order to consider a meritless argument interjected by non-parties whose only intention is to assist their colleague by befuddling the issues properly before the court. Simpson therefore respectfully requests that the proposed amici petitions be denied.

Respectfully submitted,



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ALLEGED AMICI REPRESENTATION OF ERNST & YOUNG

DAVIS POLK & WARDWELL

Lindner Dividend Fund, Inc, et al. v. Ernst & Young, 880 F.Supp. 49 (D. Mass. 1995)

In re RISDIC Litigation (Brown University Employees Credit Union), 662 A.2d 64 (S. Ct. R.I. 1995)

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

Securities and Exchange Commission v. Ernst & Young, 775 F.Supp. 411 (D. C. 1991)

WEIL GOTSHAL & MANGES LLP

Pacific Mutual Life Insurance Co. v. First Republicbank Corporation, et al., 806 F.Supp. 108 (N.D. Texas 1992)

Askanase, et al. v. Tom J. Fatjo, Jr., et al., 828 F.Supp. 461 (S.D. Tex. 1993)

Pacific Mutual Life Insurance Company v. First Republicbank Corporation, et al., 53 F.3d 1409 (5th Cir. 1995)

TGX Corp., v. Gloria Annette Turner Simmons, et al., 997 F.2d 39 (5th Cir. 1993)

Federal Deposit Insurance Corporation v. Ernst & Young, 967 F.2d 166 (5th Cir. 1992)

Robert Castro, Jr., et al. v. Painewebber, Inc., et al., 866 F.Supp. 315 (E.D. Texas 1994)

LATHAM & WATKINS

Knapp, et al. v. Ernst & Whinney et al., 1996 U.S. App. LEXIS 18482 (9th Cir. 1996)

PAUL, HASTINGS, JANOFSKY & WALKER LLP

Fidel, et al. v. Young, et al., 1996 U.S. App. LEXIS 24422 (9th Cir. 1996)

3RD CASE of Focus printed in FULL format.

LINDNER DIVIDEND FUND, INC., a Missouri corporation and WHITEHILL CAPITAL, INC., a New York corporation, Plaintiffs, v. ERNST & YOUNG, a partnership consisting of Certified Public Accountants, formerly known as ERNST & WHINNEY, Defendant.

CIVIL ACTION NO. 92-12372-WJS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

880 F. Supp. 49; 1995 U.S. Dist. LEXIS 3868; Fed. Sec. L. Rep. (CCH) P98,863

March 23, 1995, Decided

COUNSEL: [**1] For LINDNER DIVIDEND FUND, INC., a Missouri Corporation, WHITEHILL CAPITAL, INC., a New York Corporation, Plaintiffs: Benedict Bader, I. Walton Bader, Bader & Bader, White Plains, NY.

For ERNST & YOUNG, a partnership consisting of Certified Public Accountants fka Ernst & Whinney, Defendant: Ira K. Gross, Laura Steinberg, Sullivan & Worcester, Boston, MA. Daniel F Kolb, Timothy J Mayopoulos, Jacqueline O LiCalzi, Norman B Champ, III, Davis Polk & Wardwell, New York, NY.

JUDGES: Walter Jay Skinner, United States District Judge

OPINIONBY: Walter Jay Skinner

OPINION: [*51] MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

March 23, 1995

SKINNER, S.D.J.

This is an action for violations of section 18(a) of the Securities and Exchange Act of 1934, 15 U.S.C. 78r(a), gross negligence under Missouri and New York state law, and violations of the Missouri Uniform Securities Act brought by plaintiffs to recover damages suffered allegedly as a result of their purchase of securities in reliance on defendant's false and misleading statements. Defendant moves to dismiss the amended complaint pursuant to Fed. R. Civ. P. 9(b), failure to plead fraud with particularity, and pursuant [**2] to Rule 12(b) for lack of jurisdiction over the subject matter, for failure to state a claim upon which relief can be granted and for being time-barred under the applicable statute of limitations.

[*52] Background

Plaintiffs Lindner Dividend Fund, Inc. and Whitehill Capital, Inc. commenced this action to recover damages allegedly suffered as a result of their purchase of preferred stock and debentures of the Bank of New England Corporation ("BNEC") during the period from August 1989 through January 1990. The initial complaint was filed on October 2, 1992 and alleged five causes of action: violations of sections 10(b) and 18(a) of the Securities and Exchange Act of 1934 ("1934 Act"), pendent state law claims for common law fraud and gross negligence, and a claim for violations of the Missouri Uniform Securities Act.

Defendant filed a motion to dismiss the initial complaint on July 23, 1993. At a conference held on July 28, 1993, plaintiffs' counsel indicated to this court that plaintiffs would file an amended complaint rather than respond to defendant's motion. Plaintiffs filed their amended complaint on October 25, 1993.

Count I of the amended complaint alleges violations of section [**3] 18(a) of the 1934 Act. Count II alleges "gross negligence and/or reckless conduct under common law." Count III alleges violations of section 409.101 of the Missouri Uniform Securities Act. The amended complaint does not contain the section 10(b) and common law fraud claims. At the July 28, 1993 conference, this court informed plaintiffs that any claims in the initial complaint not repleaded in the amended complaint would be dismissed. Accordingly, the section 10(b) and common law fraud claims of the original complaint are dismissed.

Like the initial complaint, the crux of the amended complaint is the allegation that defendant certified BNEC's misleading 1988 10-K Annual Report and the "integrated Annual Report to Stockholders of 1988" which were both filed with the SEC on March 20, 1989. Plaintiffs allege that the information in the

142ND CASE of Level 1 printed in FULL format.

In re RISDIC Litigation (Brown University Employees Credit Union).

No. 94-707-Appeal.

SUPREME COURT OF RHODE ISLAND

662 A.2d 64; 1995 R.I. LEXIS 213

August 10, 1995, Decided

August 10, 1995, FILED

PRIOR HISTORY: [**1] Appeal from Superior Court. Providence County. Krause, J. (PC 91-1776).

COUNSEL: Bradford Gorham (Gorham & Gorham, Inc.), Providence, William G. Grande, Providence, Paul V. Gallogly (Lovett, Schefrin, Gallogly & Harnett), Providence, Aram R. Schefrin (Lovett, Schefrin, Gallogly & Harnett), Providence, H. Lee Godfrey (Susman Godfrey L.L.P.), Houston, TX, James T. McCartt (Susman Godfrey L.L.P.), Houston, TX for plaintiffs.

Leonard Decof (Decof & Grimm), Providence, John S. Foley, (Decof & Grimm), Providence for Allan M. Shine, Receiver of RISDIC and Edward D. Pare, Jr., Receiver of Brown University Employees Credit Union.

James E. Carroll (Peabody & Arnold), Boston, Sheila High King (Peabody & Arnold), Providence, Kirsten M. Lacovara (Peabody & Arnold), Providence, Harvey Weiner (Peabody & Arnold), Boston for Certain former Directors & Officers of Brown University Employees Credit Union.

Stephen P. Nugent, Providence, James McAleer (McAleer & McAleer), Providence for defendants, Norman Baris and William J. McEnery.

Michael S. Schwartz (Mandell, DeLuca & Schwartz, Ltd.), Providence for defendant Joseph Bellucci, in his capacity as a RISDIC Director.

William C. [**2] Dimitri (Dimitri & Dimitri), Providence for defendant Peter Nevola.

Eva Marie Mancuso (Hamel, Waxler, Allen & Collins), Providence, Katherine Boyle O'Mealey (Hamel, Waxler, Allen & Collins), Providence for defendant Alan Washburn, Jr., in his capacity as a RISDIC Direc.

Peter J. McGinn (Tillinghas, Collins & Graham), Providence, Jerome G. Snider (Davis Polk & Wardwell), New York for defendant Ernst & Young.

JUDGES: Weisberger, C.J., Murray, Bourcier, JJ., Concurring. Shea, J. and Lederberg, J., Not Participating.

OPINIONBY: WEISBERGER

OPINION: [*65]

OPINION

PER CURIAM. This case came before a hearing panel of this court for oral argument on June 27, 1995. After hearing the oral arguments and examining the briefs filed by the receiver of the Brown University Employees Credit Union (Brown), the receiver of Rhode Island Share and Deposit Indemnity Corporation (RISDIC), certain former RISDIC directors, certain former directors and officers of Brown, and examining the briefs filed by the plaintiffs, who are former depositors/shareholders of Brown, we conclude that the issues raised by this appeal should be summarily decided. The plaintiffs appeal from a judgment of the Superior Court dismissing [**3] their complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure. We affirm the judgment. The facts of the case insofar as pertinent to this appeal are as follows.

The plaintiffs were depositors/shareholders in Brown. Brown's deposits were insured by RISDIC. On January 1, 1991, the Governor of the State of Rhode Island concluded that RISDIC was insolvent and an-

99TH CASE of Level 1 printed in FULL format.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ERNST & YOUNG, Defendant

Civil Action No. 91-1443

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

775 F. Supp. 411; 1991 U.S. Dist. LEXIS 14374; 60 U.S.L.W. 2328; Fed. Sec. L. Rep. (CCH) P96,281

October 9, 1991, Filed

COUNSEL: [**1]

Susan Feris Wyderko, William H. Kuehnle, John M. Gannon, Attorneys for the S.E.C.; Washington, D.C.

Francis J. O'Toole; Harvey L. Pitt, James H. Schropp, David B. Hardison, Robert J. Conlan, Fried, Frank, Harris, Shriver & Jacobson; Washington, D.C., Attorneys for Ernst & Young.

JUDGES: Thomas A. Flannery, United States District Judge.

OPINIONBY: FLANNERY

OPINION: [*411] MEMORANDUM OPINION

THOMAS A. FLANNERY, UNITED STATES DISTRICT JUDGE

This case comes before the Court upon the defendant's motion to dismiss for improper venue or, alternatively, to transfer to the Northern District of Texas.

I. Background

The Securities and Exchange Commission ("SEC") brought this civil enforcement action against Ernst & Young ("E & Y") seeking a permanent injunction that would prohibit alleged future violations by E & Y of the Securities and Exchange Act of 1934 and SEC Rules promulgated pursuant to that statute. E & Y moves that this action be dismissed because venue is not proper in the District of Columbia under Rule 12 (b)(3) of the Federal Rules of Civil Procedure, or, alternatively, that this Court use its discretion pursuant to 28 U.S.C. § 1404(a) to transfer this action to the Northern District of Texas.

E & Y is the nation's largest public accounting firm, a general partnership of certified public [**2] accountants with over 2,000 partners nationwide. E & Y, which has its headquarters in New York City, has offices in more than 130 cities throughout the country; it has two offices in the District [*412] of Columbia. This suit is based on actions of one of E & Y's predecessor partnerships, Arthur Young. E & Y resulted from the merger of Arthur Young and a second firm, Ernst & Whinney. n1

n1 Since E & Y does not dispute that it is responsible for the action of its predecessors, the Court will refer to the actions of E & Y, Arthur Young, and/or Ernst & Whinney collectively as being those of "E & Y."

Federal securities law requires certain corporations to file financial reports and proxy statements with the SEC in Washington, D.C. The filings must be signed by a certified public accounting firm attesting that the firm has performed certain procedures in accordance with SEC Rules and that, based on the results of their analysis, the accounting firm is of the opinion that the filings have been prepared in accordance with standard [**3] rules of accounting and accurately represent the corporation's financial status. The SEC Rules require that the accounting firm be "independent" of the corporation making the filing.

The SEC alleges that "from 1983 through at least 1990" E & Y aided and abetted repeated violations of federal securities laws n2 in conjunction with audits performed by the Dallas, Texas office of E & Y. Plaintiff SEC's Memorandum in Opposition to Defendant E & Y's Motion to Dismiss for Improper Venue, or Alternatively, to Transfer at 4. The audits were of two Texas-based companies, RepublicBank Corporation ("Republic") and Cullum Companies, Inc. ("Cullum"), a supermarket retailer. E & Y signed audit opinions for inclusion in SEC filings for both companies certifying, amongst other things, that E & Y was "independent" of those companies. The SEC alleges that

90TH CASE of Level 1 printed in FULL format.

PACIFIC MUTUAL LIFE INSURANCE CO. Plaintiff v. FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY AND CO., INC., GOLDMAN SACHS & CO., ERNST & YOUNG & CO., and SALOMON BROTHERS INC. Defendants. SECURITIES & EXCHANGE COMMISSION, Movant.

Civil No. 3:91-CV-0441-H

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

806 F. Supp. 108; 1992 U.S. Dist. LEXIS 10530; Fed. Sec. L. Rep. (CCH) P97,059

July 13, 1992, Decided

July 13, 1992, Filed

DISPOSITION: [**1] DENIED.

COUNSEL: For PLAINTIFF: Harold E. Vanberg, Jr., BURLESON PAGE & GIBSON, 2414 North Akard, Ste. 700, P.O. Box 190623, Dallas, TX 75201-1748, and Steward M. Weltman, Michael B. Hyman and Carol V. Gilden, MUCH SHELIST FREED DENENBERG AMENT & EIGER, 200 North LaSalle St., Ste. 2100, Chicago, IL 60601-1095

For First Republicbank Corp., IFRB Corp., & Morgan Stanley & Co., Defendant: Gerald C. Conley, JACKSON & WALKER, NationsBank Plaza, 901 Main Street, Ste. 6000, Dallas, TX 75202-3714. For Goldman Sachs & Co., Defendant: Bruce W. Collins, Fletcher L. Yarbrough, Marvin S. Sloman, Barry R. Bell, Jeffrey B. Lane and Lyman G. Hughes, CARRINGTON COLEMAN SLOMAN & BLUMENTHAL, 200 Crescent Court, Ste. 1500, Dallas, TX 75201. For ERNST & YOUNG, Defendant: Johnathan M. Hoff, WEIL GOTSHAL & MANGES, General Motors Building, 767 Fifth Avenue, New York, NY 10153; Morton L. Susman, WEIL GOTSHAL & MANGES, NCNB Plaza, 700 Louisiana, Ste. 1600, Houston, TX 77002; Robert G. Cohen and Carl D. Liggio, ERNST & YOUNG, 380 Madison Ave., 3rd Floor, New York, NY 10017. For Salomon Bros., Inc., Defendant: Ernest Figari, Jr., Donald Colleluori, FIGARI & DAVENPORT, NationsBank Plaza, 901 Main St., Ste. 4800, LB 125, [**2] Dallas, TX 75202, and Theodore Gewertz, WACHTELL LIPTON ROSEN & KATZ, 299 Park Avenue, New York, NY 10171-0149.

For S.E.C., Movant: Paula M. Billingsley, Assistant United States Attorney, 1100 Commerce St., Rm. 16G28, Dallas, TX 75242-1699.

JUDGES: SANDERS

OPINIONBY: BAREFOOT SANDERS

OPINION: [*109] MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiff's Motion to Reinstate Action and supporting memorandum, filed January 31, 1992; Defendants' [*110] Response in Opposition to Plaintiff's Motion, filed February 20, 1992; Plaintiff's Reply Memorandum, filed March 2, 1992; Plaintiff's letter to the Court, dated March 5, 1992; Defendants' letter to the Court, dated March 9, 1992; Plaintiff's letter to the Court, dated March 10, 1992; Defendants' letter to the Court, dated April 3, 1992; Plaintiff's letter to the Court, dated April 16, 1992; and Plaintiff's letter to the Court, dated April 29, 1992.

On June 8, 1992, pursuant to 28 U.S.C. § 2403(a), the Court certified its intent to find unconstitutional the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, § 476, 105 Stat. 2236 (1991), and directed the United States to file any pleadings in support of the constitutionality [**3] of this statute by July 8, 1992. Accordingly, there is also before the Court the Statement of Interest of the United States and the Securities and Exchange Commission, filed July 6, 1992.

I. Factual Summary

This is a securities fraud case brought by Plaintiff Pacific Mutual Life Insurance Co. ("Pacific Mutual") on March 1, 1991. The lawsuit arises from Pacific Mutual's purchase in July and September 1987 of InterFirst 12-3/4% Notes due October 1, 1989. Pacific Mutual seeks compensatory damages under Section 10(b) of the Securities and

84TH CASE of Level 1 printed in FULL format.

DAVID ASKANASE, TRUSTEE and FITNESS CORPORATION OF AMERICA, Plaintiffs, v. TOM J. FATJO, JR., ET AL., Defendants.

CIVIL ACTION H-91-3140

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

828 F. Supp. 461; 1993 U.S. Dist. LEXIS 9132

April 5, 1993, Decided

SUBSEQUENT HISTORY: [**1] Adopting Order of June 22, 1993, Reported at: 1993 U.S. Dist. LEXIS 9105. Reported at: 828 F. Supp. 461 at 462.

COUNSEL: FOR DAVID ASKANASE, Trustee, FITNESS CORPORATION OF AMERICA, plaintiffs: Rhett G Campbell, Morris & Campbell, Ste 1617, 600 Jefferson, Houston, TX 77002, 713/659-8697.

FOR TOM J FATJO, JR, PARKGATE INC, A Corporation, defendants: Robert L Ketchand, Short & Ketchand, 11 Greenway Plaza, Ste 1520, Houston, TX 77046, 713-960-1996.

FOR JEFFREY A BAIR d/b/a CAJA: Timothy R McCormick, Thompson & Knight, Ste 3300, 1700 Pacific St, Dallas, TX 75201, (214) 969-1700.

FOR BAYOU PARK CLUB PARTNERSHIP, A Texas General Partnership, HFUND INC., defendants: Edmund Lee Haag, III, Fulbright & Jaworski, 1301 McKinney St, Ste 5100, Houston, TX 77010, 713-651-5151.

FOR RON HEMELGARN, GREAT LAKES LEASING AGENCY INTERNATIONAL, H & C INTERNATIONAL, HEMELGARN RACING INC, defendants: John Wesley Wauson, Wauson & Associates, 1300 Post Oak Blvd, Ste 410, Houston, TX 770056, 713-783-0303.

FOR BEECHMONT PARTNERSHIP, COORDINATED SPA SERVICES INC, TWENTY-FIRST CENTURY, KENNETH O MELBY, defendants: John Wesley Wauson, Wauson & Associates, 1300 Post Oak Blvd, Ste 410, Houston, TX 77056, 713-783-0303. Susan J Brandt, Thelan Marrin Johnson & Bridges, 600 Travis, Ste 6500, Houston, TX 77002, 713-224-6200.

FOR [**2] NEWTOWNE ENTERPRISES INC., JOHN SNIDEMAN dba Financial Services Corporation, JOHN SNIDEMAN dba Management Accounting Inc, defendants: Susan J Brandt, Thelan Marrin Johnson & Bridges, 600 Travis, Ste 6500, Houston, TX 77002, 713-224-6200.

FOR ERNST & YOUNG fka Ernst & Whinney, defendant: Richard W McLaren, Jr, Ernst & Young, Associate General Counsel, 2000 National City Center, Cleveland, OH 44114, 216/861-8326. Morton Lee Susman, Weil Gotshal & Manges, 700 Louisiana St, Ste 1600, Houston, TX 77002, 546-5000.

FOR HOUSPROPS INC, A Texas Corporation, PETER M JACKSON, HOUSTONIAN ESTATES INVESTMENT CO N V, A Netherlands Antilles Corporation, defendants: Frank G Jones, Fulbright & Jaworski, 1301 McKinney St, Ste 5100, Houston, TX 77010, 651-5151.

FOR HOUSTONIAN HOLDINGS PARTNERSHIP, A Texas Partnership, AHMED MANNAI, FITNESS INVESTMENT N V, A Netherlands Antilles Corporation, MANNAI INVESTMENT COMPANY INC, A Delaware Corporation, XANTOR INC, A Panamanian Corporation, defendants: Edmund Lee Haag, III, Fulbright & Jaworski, 1301 McKinney St, Ste 5100, Houston, TX 77010, 713-651-5151.

FOR ALEXANDER M MILLEY, PACIFIC ASSET HOLDINGS L P, A Delaware Limited Partnership, defendants: Jay [**3] J Madrid, Winstead Sechrest & Minick, 1201 Elm St, Ste 5400, Dallas, TX 75270, (214) 742-1700.

FOR PARKGATE ASSOCIATED LTD, defendant: Edmund Lee, Fulbright & Jaworski, 1301 McKinney, Ste 5100, Houston, TX 77010-3095, 713/651-5151.

FOR ROGER A RAMSEY, defendant: Ronald J Restrepo, Attorney at Law, 600 Travis, 4700 Texas Commerce Tower, Houston, TX 77002, 228-5100.

JOHN SNIDEMAN, FINANCIAL SERVICES CORPORATION, MANAGEMENT ACCOUNTING, INC., defendants: John Wesley Wauson, Wauson & Associates, 1300 Post Oak

10TH CASE of Level 1 printed in FULL format.

PACIFIC MUTUAL LIFE INSURANCE COMPANY, Plaintiff-Appellant, versus FIRST REPUBLICBANK CORPORATION, ET AL., Defendants-Appellees.

No. 92-1662

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

53 F.3d 1409; 1995 U.S. App. LEXIS 12727

May 26, 1995, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Texas. D.C. DOCKET NUMBER 3:91-CV-0441-H. JUDGE Barefoot Sanders.

COUNSEL: ATTORNEYS for appellant: Stewart M. Weltman, Chicago, IL.

FOR INTERVENOR USA: Barbara C. Biddle, Atty., Scott R. McIntosh, Appellate Staff, Civil Div., D. of J., Washington, DC.

ATTORNEYS FOR APPELLEES: FOR: MORGAN STANLEY & CO., DAVIS, POLK & WARDWELL, Hannah Berkowitz, James W.B. Benkard, NY/NY. HUTCHESON & GRUNDY, James L. Truitt, Dallas, TX. FOR ERNST & YOUNG: Robert G. Cohen, Kathryn Oberly, Ernest & Young, New York, NY. WEIL, GOTSHAL & MANGES, Jonathan M. Hoff, New York, NY. WEIL, GOTSHAL & MANGES, Morton Lee Susman, Houston, TX. FOR: SALOMON BROS., FIGIARI & DAVENPORT, Ernest E. Figari, Jr., Donald Colleluori, Dallas, TX. WACHTELL, LIPTON, ROSEN & KATZ, Theodore Gewertz, Robert B. Mazur, Claire D. Chappell, New York, NY. FOR: GOLDMAN & SACHS, CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, Marvin S. Sloman, Dallas, TX. SULLIVAN & CROMWELL, William Norfolk, Theodore Edelman, Tariq Maudaya, New York, NY.

FOR AMICUS: ANDERSON, ET AL., Eldon Olson, Leonard Novello, Gen. Cnsl., NY, NY. Jon N. Ekdahl, Chicago, IL.

JUDGES: Before POLITZ, [**2] Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

OPINIONBY: PER CURIAM

OPINION: [*1410] ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:

We reversed the judgment of the district court with opinion at 997 F.2d 39 (5th Cir. 1993), and the Supreme Court affirmed by an equally divided vote. Our mandate has not been issued to the district court. The Supreme Court has now held § 27A(b) to be an unconstitutional breach of separation of powers. Plaut v. Spendthrift Farm, Inc., 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995). Under that decision the claims of plaintiff are barred, and the district court would be unable to do more than repeat its prior judgment. Therefore, our opinion and judgment are vacated, and the judgment of the district court is affirmed.

AFFIRMED.

16TH CASE of Level 1 printed in FULL format.

TGX CORP., Plaintiff, versus GLORIA ANNETTE TURNER SIMMONS, ET AL., Defendants-Appellants Cross-Appellees, versus GREENWICH INSURANCE COMPANY, ET AL., Defendants-Appellees Cross-Appellants. GAYLON D. SIMMONS, ET AL., Plaintiffs-Appellants Cross-Appellees, versus J.C. TEMPLETON, ET AL., Defendants-Appellees Cross-Appellants. PACIFIC MUTUAL LIFE INSURANCE CO., Plaintiff-Appellant, versus FIRST REPUBLICBANK CORP., ET AL., Defendants-Appellees.

No. 92-3375, No. 92-1662

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

997 F.2d 39; 1993 U.S. App. LEXIS 18359; Fed. Sec. L. Rep. (CCH) P97,664

July 20, 1993, Decided

SUBSEQUENT HISTORY: As Corrected. Petition for Rehearing Denied August 25, 1993, Reported at: 1993 U.S. App. LEXIS 24107.

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Texas. Appeal from the United States District Court for the Eastern District of Louisiana. D.C. DOCKET NUMBER 3:91-CV-0441-H. JUDGE Barefoot Sanders. D.C. DOCKET NUMBER CA-87-5298-H & CA-90-849-H. JUDGE Peter Beer

DISPOSITION: We REVERSE the orders of the district courts and reinstate the cases. We REMAND for further proceedings consistent with this opinion.

COUNSEL: For Plaintiff-Appellant (92-1662): Stewart M. Weltman, 135 South LaSalle St., Ste. 1918, Chicago, IL 60603, (312)419-4670. For INTERVENOR USA (92-1662): Barbara C. Biddle, Atty., Scott R. McIntosh, Appellate Staff, Civil Div., Rm. 3127, D. of J., 10th & Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-4052. For Appellants (92-3375): LEPAYRE, TERRELL & RANDAZZO, F. Henri Lapeyre, Jr., 400 Poydras St., Ste. 1980, NOLA 70130-3277, (504)524-5152.

For MORGAN STANLEY & CO. (92-1662): DAVIS, POLK & WARDELL, Hannah Berkowitz, James W.B. Benkard, 450 Lexington Ave., NY/NY 10017, (212-450-4000). HUTCHESON & GRUNDY, James L. Truitt, 901 Main St., Ste. 6200, Dallas, TX 75202-3714, (214/761-2800). For ERNST & YOUNG (92-1662): Robert G. Cohen, Kathryn Oberly, Ernest & Young, 380 Madison Ave., New York, NY 10017. WEIL, GOTSHAL & MANGES, Jonathan M. Hoff, Gen. Motors Bldg., 767 Fifth Ave., New York, NY 10153, (212/310-8000). WEIL, GOTSHAL & MANGES, Morton Lee Susman, NCNB Plaza, 700 Louisiana, Ste. 1600, Houston, TX 77002, (713/546-5196). For SALOMON BROS. (92-1662): FIGIARI & DAVENPORT, Ernest E. Figari, Jr., Donald Colleluori, NationsBank Plaza, 901 Main St., Ste. 4800 - LB 125, Dallas, TX 75202, (214/939-2000). WACHTELL, LIPTON, ROSEN & KATZ, Theodore Gewertz, Robert B. Mazur, Claire D. Chappell, 299 Park Ave., New York, NY 10171-0149, (212/371-9200). For GOLDMAN & SACHS (92-1662): CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, Marvin S. Sloman, 200 Crescent Ct., Ste. 1500, Dallas, TX 75201, (214/855-3000). SULLIVAN & CROMWELL, William Norfolk, Theodore Edelman, Tariq Maudaya, 125 Broad St., New York, NY 10004, (212/558-4000). For GREENWICH INS. CO., ET AL. (92-3375): James M. Garner, Dermot S. McGlinchey, Martha M. Young, J. Forrest Hinton, MCGLINCHEY, STAFFORD, CELLINI & LANG, 643 Magazine St., NOLA 70130, (504)586-1200. For J.C. TEMPLETON, ET AL. (92-3375): MONTGOMERY, BARNETT, ET AL., Patrick O'Keefe, Harold B. Carter, Jr., Stephen Williamson, Leila D'Aquin, 1100 Poydras St., 3200 Energy Centre, NOLA 70163-3200, (585-3200). For BDO SEIDMAN (92-3375): LISKOW & LEWIS, Julie E. Schwartz, One Shell Sq., 50th Fl., NOLA 70139-5001, (581-7979). HAYNES & BOONES, Donald C. Templin, Phillip Philbin, 901 Main St., Ste. 3100, NCNB Plaza, Dallas, TX 75202-3714, (214)651-5590.

For AMICUS: ANDERSON, ET AL.: Eldon Olson, Gen. Cnsl., Price Waterhouse, 1285 Avenue of the Americas, NY, NY 10019, (212-819-4878). Jon N. Ekdahl, 69 N. Washington, Chicago, IL 60601, (312-507-2345).

For INTERVENOR-USA (92-3375): Barbara C. Biddle, Atty., Scott R. McIntosh, Appellate Staff, Civil Div., Room 3127, Justice Dept., 10th & Penn. Ave., NW, Wash, D.C. 20530, 202-514-2541. Paul Gonson, Solicitor, Jacob H. Stillman, Associate Gen. Cnsl.,

3RD CASE of Focus printed in FULL format.

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff-Appellant, v. ERNST & YOUNG, et al., Defendants-Appellees.

No. 91-7193.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

967 F.2d 166; 1992 U.S. App. LEXIS 17560

August 3, 1992, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Texas. D.C. DOCKET NUMBER CA3-90-0490-H. JUDGE Barefoot Sanders

DISPOSITION: AFFIRMED.

COUNSEL: FOR FDIC: Dorothy Nichols, Assoc. Gen. Counsel, Colleen B. Bombardier, Senior Csl., Jerome A. Madden, Cnsl., Floyd I. Robinson, Sr. Cnsl., Melissa Satterwhite, FDIC, 550 17th St., 4th Fl., Washington, DC 20429, (202/898-3505), (H6022A), Ste. H-6108. HOPKINS & SUTTER, John P. Greenan, Vincent J. Hudock, Jr., Vera L. Peo, 3700 Bank One Ctr., 1717 Main St., Dallas, TX 75201, (214/653-2100). Hopkins & Sutter, John L. Conlon, Three First Nat. Plaza, Ste. 4200, Chicago, IL 60602, (312) 558-6650.

For Defendants-Appellees: ERNST & YOUNG, Kathryn A. Cherly, 1200 19th St., N.W., Ste. 400, Washington, DC 20036, (202) 663-9871. Carl D. Liggio, ERNST & YOUNG, 380 Madison Ave., 3rd Fl., New York, NY 10017, (212/773-3900). MAYER, BROWN & PLATT, Wendy A. Ackerman, 2000 Pennsylvania Ave., N.W., Washington, DC 20006. WEIL, GOTSHAL & MANGES, Morton L. Susman, 700 Louisiana, Ste. 1600, Houston, TX 77002, (713) 546-5200.

JUDGES: Before POLITZ, Chief Judge, and WILLIAMS and DUHE, Circuit Judges.

OPINIONBY: JERRE S. WILLIAMS

OPINION: [*168] JERRE S. WILLIAMS, Circuit Judge:

The Federal Deposit Insurance Corporation brought suit against Ernst & Young. The suit asserts that Arthur Young & Company and its successor Ernst & Young both negligently audited Western Savings Association and breached their contracts to audit Western Savings. The district court dismissed the breach of contract action for failure to state a claim. The court also granted Ernst & Young's motion for summary judgment on the negligence claim. The Federal Deposit Insurance Corporation appeals the two rulings.

I. FACTS

On August 30, 1982, Jarrett E. Woods, Jr. purchased 100% of Gatesville Savings and Loan Association's stock. He subsequently transferred the stock to Western Capital Corporation and changed the name of Gatesville Savings to Western Savings Association ("Western"). Woods also owned all of Western Capital Corporation. Woods, therefore, was Western's sole owner.

Woods effectively dominated and controlled Western. Upon acquiring Western, he expanded the board of directors [**2] and appointed himself as chairman and chief operating officer. He was also Western's chief executive officer, and he served on its executive, loan, audit, compliance, and credit policy committees. He further held various offices in Western's wholly-owned subsidiaries, including Westwood Mortgage Company and WS Service Corporation.

Pursuant to his domination and control of Western, Woods dramatically changed its policies and practices. Western aggressively began to pursue complex commercial ventures that often were based upon unsafe and unsound underwriting practices. Western's commercial real estate transactions generated paper profits, making Western appear solvent. The FDIC further alleges that Woods made false entries in Western's books with intent to deceive Western's board and government regulators, and he conspired to misapply Western's funds. The FDIC claims these policies were part of a scheme by Woods to defraud

59TH CASE of Level 1 printed in FULL format.

ROBERT CASTRO, JR., et al., Plaintiffs, v. PAINEWEBBER, INC., et al., Defendants.

Case No. 94-CV-65 and 94-CV-256 (Consolidated)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION

866 F. Supp. 315; 1994 U.S. Dist. LEXIS 15783

October 5, 1994, Decided Nun Pro Tunc

October 5, 1994, Filed

COUNSEL: [**1] For ROBERT CASTRO, JR, RAYE CASTRO, ALL PLAINTIFFS, CARL HANKS, DANIEL DOIRON, LYNDA DOIRON, ROBERT FALGOUT, HARLAN HARRISON, PEGGY HARRISON, EDWARD KENNEDY, CAROL KENNEDY, JOHN MCCLELLAND, LYNDA MCCLELLAND, WILLIAM MOORHEAD, BRENDA MOORHEAD, W T STANFORD, TOMMIE MAE STANFORD, ROY A WHITE, CAROLYN WHITE, JAMES WISE, SR, BETTY JANE WISE, JOHN T CAMPBELL, SAMUEL NUCHIA, GEORGE ANN NUCHIA, plaintiffs: Michael A Havard, Richard Lyle Coffman, Provost & Umphrey, Beaumont, TX, Jefferson. Michael S Burg, Attorney at Law, Houston, TX.

For EDNA C MATTOX, LARRY GENE COCHRAN, ERIS ELIZABETH COCHRAN, THOMAS J BARLAND, GERALDINE Y BARLAND, FRANK A JOHNSTON, LINDA K JOHNSTON, consolidated plaintiffs: Richard Lyle Coffman, Provost & Umphrey, Beaumont, TX, Jefferson.

For PAINEWEBBER INC, PAINEWEBBER GROUP INCORPORATED, REGIONAL S&L INVESTORS, INCORPORATED, defendants: J Hoke Peacock, II, Orgain Bell & Tucker, Beaumont, TX, Jefferson. Mitchell A Karlan, Gibson Dunn & Crutcher, New York, NY. For ESSEX FINANCIAL GROUP INCORPORATED, LAWRENCE N SMITH, defendants: Robert L O'Donnell, Vandeventer Black Meredith & Martin, Norfolk, VA. For ESSEX FINANCIAL PARTNERS, L P, defendant: John G Bissell, Strong [**2] Pipkin Nelson & Bissell, Beaumont, TX, Jefferson. James J Wheaton, Willcox & Savage PC, Norfolk, VA. For ERNST & YOUNG, defendant: Robert G Cohen, Ernst & Young, New York, NY, Ralph I Miller, Weil Gotshal & Manges, Dallas, TX, Dallas.

For WILLIAM BUCHALTER, SCOTT WINTER, consolidated defendants: J Hoke Peacock, II, Orgain Bell & Tucker, Beaumont, TX, Jefferson.

For CHARLES W TUPPER, BETTY R TUPPER, CECIL BROUSSARD, WINNIE BROUSSARD, plaintiffs: Michael A Havard, Richard Lyle Coffman, Provost & Umphrey, Beaumont, TX, Jefferson. Michael S Burg, Attorney at Law, Houston, TX.

JUDGES: SCHELL

OPINIONBY: RICHARD A. SCHELL

OPINION: [*316] MEMORANDUM OPINION AND ORDER

This opinion and order addresses an on-the-record objection to a proposal that certain class members receive additional cash compensation. The objection might not be unusual were it to have come from defense counsel; here, however, it is urged by the firm of Provost * Umphrey, Plaintiffs' counsel in this matter. For the reasons which follow, it is OVERRULED.

BACKGROUND

The instant class-action securities litigation owes its existence to the ill-fated Essex Financial Partners, L.P. ("Essex"). Although, as shall be explained later, the majority of argument [**3] in this case has involved the merits of the settlement of the action instead of the merits of the action itself, a brief explanation of preceding events may be helpful.

a. High hopes

Defendant PaineWebber began offering Limited Partnership Units ("LPUs") in Essex to the public in August of 1989. The price was $ 20/LPU. n1 Essex hoped to cash in on then-recent developments in the banking industry by cheaply acquiring a series of banks (beginning with Essex Savings Bank) and then reselling them at a profit five to seven years thereafter. n2 Essex' initial public offering involved the issuance of 2,078,382 LPUs.

7TH CASE of Level 1 printed in FULL format.

STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff-Appellee, -vs- PHILIP J. GOMEZ; DOUGLAS J. O'CONNOR, Defendants-Appellants. STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff-Appellant, -vs- PHILIP J. GOMEZ; DOUGLAS J. O'CONNOR; ERNST & WHINNEY, Defendants-Appellees.

No. 94-56380, No. 94-56381

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1996 U.S. App. LEXIS 18482

February 6, 1996 *, Submitted, Pasadena, California

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

July 23, 1996, FILED

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 92 F.3d 1192, 1996 U.S. App. LEXIS 28156.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of California. D.C. No. CV-87-00067-MLH. Marilyn L. Huff, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: For STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff - Appellee (94-56380): Dennis Stewart, Esq., Theodore J. Pintar, MILBERG WEISS BERSHAD HYNES & LERACH LLP., San Diego, CA.

PHILIP J. GOMEZ, Defendant - Appellant (94-56380), Pro se, Incline Village, NV.

DOUGLAS J. O'CONNOR, Defendant - Appellant (94-56380), Pro se, Huntington Beach, CA.

For STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff - Appellant (94-56381): Leonard B. Simon, Esq., Dennis Stewart, Esq., Theodore J. Pintar, MILBERG WEISS BERSHAD HYNES & LERACH LLP., San Diego, CA.

For ERNST & WHINNEY, Defendant - Appellee (94-56381): Kathryn A. Oberly, Esq., ERNST & YOUNG, Washington, DC. Peter H. Benzian, Esq., LATHAM & WATKINS, San Diego, CA. Daniel M. Gray, ERNST & YOUNG LLP, Washington, DC.

DOUGLAS [*2] J. O'CONNOR, Defendant - Appellee (94-56381), Pro se, Huntington Beach, CA.

PHILIP J. GOMEZ, Defendant - Appellee (94-56381), Pro se, Incline Village, NV.

JUDGES: Before: WALLACE, FERGUSON, and T.G. NELSON, Circuit Judges.

OPINION: MEMORANDUM

Gomez and O'Connor appeal from a general jury verdict holding them liable for violating the securities laws. This disposition resolves solely the issues raised by Gomez and O'Connor in their pro se appeal. The district court had jurisdiction pursuant to 15 U.S.C. § 78aa and 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

A district court's evidentiary rulings are reviewed for an abuse of discretion and should not be reversed absent some prejudice. Roberts v. College of the Desert, 870 F.2d 1411, 1418 (9th Cir. 1988). Gomez and O'Connor incorrectly argue that they were denied a fair trial because the jury was unable to

1ST CASE of Focus printed in FULL format.

STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff-Appellee, v. ERNST & WHINNEY, Defendant-Appellant. STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff-Appellee, v. PHILIP J. GOMEZ; DOUGLAS J. O'CONNOR, Defendants-Appellants. STANLEY KNAPP, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. PHILIP J. GOMEZ; DOUGLAS J. O'CONNOR; ERNST & WHINNEY, Defendants-Appellees.

No. 94-56379, No. 94-56380, No. 94-56381

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

90 F.3d 1431; 1996 U.S. App. LEXIS 18145; Fed. Sec. L. Rep. (CCH) P99,282; 96 Cal. Daily Op. Service 5415; 96 Daily Journal DAR 8834

February 6, 1996, Argued, Submitted, (94-56379), February 6, 1996, Submitted, (94-56380 & 94-56381) * Pasadena, California

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

July 23, 1996, Filed

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Southern District of California. D.C. No. CV-87-00067-MLH. Marilyn L. Huff, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: Peter H. Benzian, Latham & Watkins, San Diego, California; Daniel M. Gray, Ernst & Young, Washington, D.C., for the defendant-appellant-cross-appellee.

Leonard B. Simon and Dennis Stewart, Milberg Weiss Bershad Hynes & Lerach, San Diego, California, for the plaintiff-appellee- cross-appellant.

Douglas J. O'Connor, pro se, Huntington Beach, California, defendant-appellant-cross-appellee.

Philip J. Gomez, pro se, Incline Village, Nevada, defendant- appellant-cross-appellee.

JUDGES: Before: J. Clifford Wallace, Warren J. Ferguson, and Thomas G. Nelson, Circuit Judges. Opinion by Judge Wallace.

OPINIONBY: WALLACE

OPINION: [*1433] OPINION

WALLACE, Circuit Judge:

Ernst & Whinney appeals from a general jury verdict in favor of the plaintiff class (Knapp). Knapp cross-appeals from the district court's denial of prejudgment interest and the dismissal of various state-law causes of action. The district court had jurisdiction pursuant to 15 U.S.C. § 78aa and 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant [**2] to 28 U.S.C. § 1291. We affirm.

I

ATV Systems, Inc. (ATV) was founded by Philip Gomez, Douglas O'Connor, and Frank Gleason in 1981. The company specialized in point-of-sale microprocessing systems designed for retail applications and also dealt in more generalized data processing and communications equipment for office use. The principals had been involved in the high-tech [*1434] field and considered themselves well-versed in "turnaround" techniques. They were experienced in taking troubled companies, slashing waste, increasing productivity, improving the bottom line, and turning the companies into profitable enterprises. There were many businesses in need of such redirection in the early 1980s because interest rates were high and credit was tight. ATV's business plan was to acquire bankrupt companies at bargain prices, liquidate un-

5TH CASE of Level 1 printed in FULL format.

BERNARD FIDEL; JOE BINDER, in their capacity as proposed intervenors, Plaintiffs-Appellants, and, JOHN GLAVARIS; PATRICIA GLAVARIS; BENNY L. TOLLEY, Plaintiffs, v. HERBERT J. YOUNG; JAMES A. THAYER; JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K.S BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE HUTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR SAVINGS, F.A. MELVIN RIFKIND, et al.; KPMG PEAT MARWICK; GIBSON, DUNN & CRUTCHER; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H.DUDLEY; RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM; RESOLUTION TRUST CORPORATION, Defendants-Appellees.

No. 95-55926

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1996 U.S. App. LEXIS 24422

August 7, 1996, Argued and Submitted, Pasadena, California

September 16, 1996, FILED

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 97 F.3d 1459, 1996 U.S. App. LEXIS 38307.

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. D.C. No. CV-90-6185-MRP. Mariana R. Pfaelzer, District Judge, Presiding.

DISPOSITION: Fidel's appeal dismissed for lack of jurisdiction.

COUNSEL: For BERNARD FIDEL, Plaintiff - Appellant: Robert H. Bretz, Esq., Marina Del Rey, CA.

For JOE BINDER, in their capacity as proposed intervenors, Plaintiff - Appellant: Robert H. Bretz, Esq., (See above).

For HERBERT J. YOUNG, Defendant - Appellee: Rory M. Hernandez, Esq., Martin C. Washton, Esq., Edward Perez, Legal, GIBSON, DUNN & CRUTCHER, Los Angeles, CA.

For JAMES N. THAYER, JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K.S. BLOUNT; ROBERT R. SPRAGUE HOUSTON I. FLOURNOY; BERNICE HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR SAVINGS, F.A.; MELVIN RIFKIND, et al., Defendant - Appellee: Rory M. Hernandez, Esq., (See above). Martin C. Washton, Esq., (See above). Stephen A. Kroft, Esq., McDERMOTT, WILL & EMERY, Los Angeles, [*2] CA.

For KPMG PEAT MARWICK, Defendant - Appellee: Ralph J. Shapira, Esq., Diane E. Pritchard, Esq., O'MELVENY & MYERS, Los Angeles, CA.

For GIBSON, DUNN & CRUTCHER LLP, Defendant - Appellee: Stephen A. Kroft, Esq., (See above).

For ERNST & WHINNEY, Defendant - Appellee: Rory M. Hernandez, Esq., (See above). Elizabeth W. Walker, Esq., PAUL, HASTINGS, JANOFSKY & WALKER, Los Angeles, CA.

For ERNST & YOUNG, Defendant - Appellee: Rory M. Hernandez, Esq., (See above). Elizabeth W. Walker, Esq., (See above).

For WILLIAM H. DUDLEY, Defendant - Appellee: Elizabeth W. Walker, Esq., (See above).

For RESOLUTION TRUST CORPORATION, as Receiver for Gibralter Savings, Defendant - Appellee: Harold G. Becks, Esq., WILSON & BECKS, Los Angeles, CA.

For MELVIN RIFKIND, Defendant - Appellee: Carey B.

MARTINDALE-HUBBELL LIST OF CLIENTS - ERNST & YOUNG

DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN

FOCUS - 5 OF 5 LISTINGS

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STATEMENT OF PRACTICE: Banking and Finance, Bankruptcy, Commercial Litigation, Corporate Law and Securities, Employee Benefits, Employment Relations, Energy, Environmental, Estate Planning/Probate, Immigration, Intellectual Property, Products Liability, Public Finance, Real Estate, Taxation.

... Pont de Nemours; Elf Atochem North America, Inc.; Emerson Electric Co.; Environmental Research Institute of Michigan; Ernst & Young; FANUC Robotics North America, Inc.; Federal-Mogul Corporation; Florists' Transworld Delivery Association; Ford Motor Company; ...

Case Western Reserve University (J.D., 1993). National Moot Court; Order of the Barristers. Recipient: American Jurisprudence Award in Oral Advocacy; Dean Dunmore Moot Court Award. Member: Ohio State (Member, Labor and Employment Law Section) and American (Member, Labor and Employment Law Section) Bar Associations; State Bar of Texas (Member, Labor and Employment Law Section). Practice Areas: Labor and Employment; Commercial Litigation. Email: amy_martin%Dickinson-Wright@notes.worldcom.com

JEFFREY E. THOMPSON. Position: Associate. Born Tacoma, Washington, March 6, 1968; admitted to bar, 1993, Michigan. Education: Northwestern University (B.A., 1990); University of Illinois (J.D., 1993). Member, University of Illinois Law Review. Author: "Damage Caused By Reintroduced Wildlife: Should The Government Be Held Accountable?" Vol. 1992 U. Ill. L. Rev. 1183. Member: State Bar of Michigan. Email: jeffrey_thompson%Dickinson-Wright@notes.worldcom.com

REPRESENTATIVE CLIENTS: American Seating Company; Ameritech International; Ameritech Publishing, Inc.; Arthur Andersen & Co.; Autocam Corporation; Automobile Club of Michigan; Barden Cablevision; Chrysler Corporation; Chrysler Credit Corporation; Chrysler Financial Corporation; City of Grosse Pointe Farms; County of Grand Traverse; Classic Chevrolet, Inc.; Cranbrook Educational Community; Deloitte & Touche; Du Pont de Nemours; Elf Atochem North America, Inc.; Emerson Electric Co.; Environmental Research Institute of Michigan;

Ernst & Young; FANUC Robotics North America, Inc.; Federal-Mogul Corporation; lorists' Transworld Delivery Association; Ford Motor Company; General Motors orporation; Gerber Products Company; Goodyear Tire & Rubber Co.; Henry Ford ommunity College; Herb Ritsema Company; Hobart Corp.; InsurAmeriCorp; nterflora, Inc.; Johnson & Johnson; Kamax-Werke Rudolf Kellerman Gmgh & Co.; mart Corporation; Kuhlman Corporation; Letts Industries, Inc.; Mallinckrodt nc.; Mellon Bank, N.A.; Melon-McMahon Real Estate Advisors Inc.; Michigan onsolidated Gas Co.; Michigan Health Care Corporation; Miller Brewing Co.; inistry of Privatization of the Republic of Poland; NBD Bank; Nippondenso merica, Inc.; Nissan Research and Development, Inc.; Northwest Airlines; akland Community College; Oakland University; Olde Financial Corporation; ioneer Incorporated; Polish Development Bank; Premark International; Quality omputers, Inc.; Republic Bancorp, Inc.; Riviera Die & Tool, Inc.; Ross Roy ommunications; Schulers, Inc.; Suburban Mobility Authority Regional ransportation (SMART); Suzuki Motor Co., Ltd.; The Empire Company, Inc.; The armon Group, Inc.; Thiokol Corp.; Travel Consultants, Inc.; University of etroit Mercy; UNO-VEN; W.R. Grace & Co.; W.Y. Campbell & Co.

For complete biographical data on all personnel, see Professional Biographies t Detroit, Michigan)

Kathryn A. (Kay) Oberly, Ernst & Young L.L.P., New York

She Insists on ADR, Firm Ties, Honesty

AGE: 46

TITLE: Vice chair and general counsel

DEPUTIES: Robert G. Cohen (litigation); Douglas M. Galin (corporate and transactional matters); John E. Matson (accounting and auditing counseling).

THE BUSINESS: Ernst & Young is one of the "big six" accounting firms; it bills itself as "the largest integrated professional services firm in the nation." It had 1996 revenues of $3.57 billion and employed 23,000 people in 112 U.S. offices. (Ernst & Young International has revenues in excess of $7 billion and employs more than 72,000 in 134 countries.) E&Y audits 117 of the Fortune 500 companies and is the leading provider of tax services in the United States.

SIZE OF DEPARTMENT: 117 employees in total; 28 lawyers and 17 auditors. The lawyers are located in New York (17), Los Angeles (6) and Washington, D.C. (5). The auditors live in seven different cities, traveling to wherever litigation is pending.

STRUCTURE OF DEPARTMENT: "The lawyers are divided, somewhat loosely, into three general groups: litigation; corporate and transactional; and human resources and employment."

PRIMARY OUTSIDE COUNSEL: "We use a number of different firms around the country, depending on various factors such as the need for

[SEE 'OBERLY' PAGE B3]

THE NATIONAL LAW JOURNAL, MONDAY, FEBRUARY 17, 1997 - B1

With Outside Counsel, Relationships Are Key

['OBERLY' FROM PAGE B1]
litigation counsel in the jurisdiction we're in or the need for specialized expertise such as intellectual property law. In general though, we have a few firms around the country with which we have long-term relationships and we tend to use those firms most often. They are Mayer, Brown & Platt [Chicago and Washington, D.C.]; Davis Polk & Wardwell [New York]; Heller Ehrman White & McAuliffe [West Coast]; and Latham & Watkins [West Coast]." Overseas, the company uses Baker & McKenzie at several of its locations.

ROUTE TO THE TOP: Ms. Oberly received her bachelor's degree in political science from the University of Wisconsin at Madison. She clerked for Judge Donald P. Lay of the 8th U.S. Circuit Court of Appeals. After her clerkship, she joined the U.S. Department of Justice, where she spent 12 years as an appellate litigator and argued 12 cases before the U.S. Supreme Court. In 1986 she became a partner in the D.C. office of Mayer, Brown & Platt. After five years of appellate litigation practice, Ms. Oberly joined her client Ernst & Young as associate general counsel. She opened E&Y's D.C. office to handle appellate litigation and "special projects." In October 1994, Ms. Oberly was promoted to her current post.

CAREER HIGHLIGHT: While at Mayer Brown and in her first year at Ernst & Young, Ms. Oberly argued and won (7-2) a landmark insurance case before the Supreme Court. *Reves v. Ernst & Young* (1993) held that "for the most part RICO claims cannot be brought against accountants who are just performing services for their clients...The language of the statute doesn't stretch to cover the outside adviser as opposed to the people actually managing the business." Says Ms. Oberly: "Prior to that case, we—I don't mean Ernst & Young but accounting firms generally—would frequently see RICO claims being included in complaints, and, of course, they were included because RICO includes treble damages, and it would boost what plaintiffs perceived to be the settlement value of the case just by the threat of treble damages. We have

> Globalization has meant E&Y's legal department is busy learning new forms of doing business in new places.

OTHER CHANGES: Ms. Oberly cut her department by some 32 lawyers but has recently added a few corporate/transactional lawyers. Now, she says, "We have our legal department at the right size and right mix of different skills."

Ms. Oberly says E&Y's growth into new areas has been her "greatest challenge" since "my background is in litigation...We're the first of the big six firms to have an online subscription service. It's called Ernie, and it is available to subscribers to answer their tax questions. We also have one of the largest healthcare consulting practices in the country with 200 doctors and nurses on our staff. Also, with globalization, we in the legal department have had to get up to speed and hopefully ahead of the curve in new forms of doing business in new places."

ON MARKETING: "I tend to hire lawyers I already know and have already worked with...The lawyers I go back to are really an adjunct of my department and they work with us so closely that I can pick up the phone and call one of them just as comfortably as I can call somebody within the department. It is hard if not impossible for someone who's making the sales pitch to get to that stage."

PET PEEVES: Her "cosmic" pet peeve is the civil justice system's inefficiency. "I don't think you see this until you are inside counsel. But our system is one of the most costly and cumbersome ways of resolving disputes anybody could devise...[L]awyers as a profession should work on ways to make the resolution of legal disputes more like business deals...My small-scale pet peeve is with the law firms that don't read the billing protocol. [Our] protocol specifies that if a firm wants to request an increase in its billing rates they will provide us with 60 days' notice...[But some firms] think that they can just surreptitiously raise their billing rates by sending us an invoice with higher rates...It is particularly galling when you're an accounting firm to have the firms think that you won't notice!...[W]e don't...use that firm again."

LEGISLATIVE ACTIVITIES: "The accounting profession...worked very hard

THE NATIONAL LAW JOURNAL, MONDAY, FEBRUARY 17, 1997 - B3

BEST AVA

Department of Justi[ce] where she spent 12 years as an appe[llate] litigator and argued 12 cases before the U.S. Supreme Court. In 1986 she became a partner in the D.C. office of Mayer, Brown & Platt. After five years of appellate litigation practice, Ms. Oberly joined her client Ernst & Young as associate general counsel. She opened E&Y's D.C. office to handle appellate litigation and "special projects." In October 1994, Ms. Oberly was promoted to her current post.

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Globalization has meant E&Y's legal department is busy learning new forms of doing business in new places.

ON PRIVATE PRACTICE: "I enjoyed it. There are parts...I miss—the ability to work really intensely on one case, writing the brief or preparing for an argument...I find that the job of general counsel has me doing so many things, I can't drop 90 percent of them in order to focus on just one. On the other hand, I don't miss the marketing and sales aspect of private practice. It certainly intensified while I was in private practice and in recent years, though maybe it's flattening out a little bit. But the pressure to bring in business is something that is a distraction from practicing law, and I don't think there is any partner in any firm who is immune from the transformation of the profession into a sales and marketing culture."

INNOVATION: Before Ms. Oberly became general counsel at Ernst & Young, the accounting firm had a reputation for fighting every lawsuit, and it had a relatively large in-house team. Ms. Oberly has been a staunch proponent of alternative dispute resolution. Her contracts with clients call for nonbinding mediation in the event of a dispute and, if that is unsuccessful, then binding arbitration.

already know and have already worked with...The lawyers I go[to] to are really an adjunct of my department and they work with us so closely that I can pick up the phone and call one of them just as comfortably as I can call somebody within the department. It is hard if not impossible for someone who's making the sales pitch to get to that stage."

PET PEEVES: Her "cosmic" pet peeve is the civil justice system's inefficiency. "I don't think you see this until you are inside counsel. But our system is one of the most costly and cumbersome ways of resolving disputes anybody could devise...[L]awyers as a profession should work on ways to make the resolution of legal disputes more like business deals...My small-scale pet peeve is with the law firms that don't read the billing protocol. [Our] protocol specifies that if a firm wants to request an increase in its billing rates they will provide us with 60 days' notice...[But some firms] think that they can just surreptitiously raise their billing rates by sending us an invoice with higher rates...It is particularly galling when you're an accounting firm to have the firms think that you won't notice!...[W]e don't...use that firm again."

LEGISLATIVE ACTIVITIES: "The accounting profession...worked very hard for the passage of the Private Securities Litigation Reform Act of 1996." As for the controversial "whistleblower" or fraud detection sections of the act, Ms. Oberly says they will make little difference in obligations of accountants.
"It's always been the obligation of accountants to plan their audit in a way that will, if possible, find irregularities...But if what you really need done is a forensic audit, then that is not a standard financial statement audit...If you have sophisticated fraudfeasors bent on pulling off a scheme, they can fool the auditors."

PROFESSIONAL ACTIVITIES: Member of the American Law Institute; the American Bar Association's General Counsel Committee and the American Corporate Counsel Association.

FAMILY: Ms. Oberly, who commutes to her office in New York, lives in Washington, D.C., with her teen-age son, Michael.

SPORTS/HOBBIES: "Lots of time on the treadmill with Books on Tape to kill the monotony." Swimming and skiing. Reading, cooking.

LATEST BOOK READ: Stephen Frey's financial thriller, "The Vulture Fund." NLJ

ILABLE COPY

15TH CASE of Level 1 printed in FULL format.

ED PLAUT; his wife, NANCY MCHARDY PLAUT; JOHN GRADY, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. SPENDTHRIFT FARM, INC.; BATEMAN EICHLER, HILL RICHARDS, INC.; FRANCIS M. WHEAT; GIBSON, DUNN & CRUTCHER; DELOITTE, HASKINS & SELLS; NORMAN D. OWENS; AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC., Defendants-Appellees.

No. 92-5591

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1 F.3d 1487; 1993 U.S. App. LEXIS 19738; Fed. Sec. L. Rep. (CCH) P97,684

March 1, 1993, Argued

August 3, 1993, Decided

August 3, 1993, Filed

SUBSEQUENT HISTORY: [**1] Rehearing En Banc Denied October 14, 1993, Reported at: 1993 U.S. App. LEXIS 27485.

PRIOR HISTORY: On Appeal from the United States District Court for the Eastern District of Kentucky. District No. 87-00438. Joseph M. Hood, District Judge.

DISPOSITION: AFFIRMED

COUNSEL: For ED PLAUT, his wife, NANCY MCHARDY PLAUT, JOHN GRADY, on behalf of themselves and all others similarly situated, Plaintiffs - Appellants: J. Montjoy Trimble, ARGUED, BRIEFED, 606-259-0523, Trimble & Bowling, 163 W. Short Street, Suite 610 Central Bank Building, Lexington, KY 40507.

For SPENDTHRIFT FARM, INC., Defendant - Appellee: Richard C. Ward, 606-233-2012, David C. Long, 606-233-2012, Barbara Edleman, BRIEFED, 606-255-6676, Glenn C. Van Bever, ARGUED, Wyatt, Tarrant & Combs, 250 W. Main Street, Suite 1700 Lexington Financial Center, Lexington, KY 40507-1732. For BATEMAN EICHLER, HILL RICHARDS, INC., Defendant - Appellee: Guy R. Colson, Senior Partner, 606-252-6731, Fowler, Measle & Bell, 4-A Bank One Plaza, Lexington, KY 40507-1680. Elizabeth S. Feamster, 606-252-6731, Bank One Plaza, Fourth Floor, Lexington, KY 40507-1680. James E. Burns, Jr., 415-442-0900, John Missing, 415-442-0900, Kevin P. Muck, BRIEFED, 415-442-0900, Brobeck, Phleger & Harrison, 1 Market Plaza, Spear Street Tower, San Francisco, CA 94105. For FRANCIS M. WHEAT, GIBSON, DUNN & CRUTCHER, Defendants - Appellees: Robert M. Watt, III, BRIEFED, 606-231-3000, J. David Smith, Jr., 606-231-3000, Stoll, Keenon & Park, 201 E. Main Street, Suite 100 First Security Plaza, Lexington, KY 40507-1380. William E. Johnson, 502-875-6000, Stoll, Keenon & Park, 326 W. Main Street, Frankfort, KY 40601. For DELOITTE, HASKINS & SELLS, Defendant - Appellee: L. Clifford Craig, ARGUED, BRIEFED, 513-381-2838, Taft, Stettinius & Hollister, 425 Walnut Street, Suite 1800 Star Bank Center, Cincinnati, OH 45202. Peter L. Ecabert, Deloitte, Haskins & Sells, 1633 Broadway, Suite 6, New York, NY 10019-6753. Robert B. Craig, BRIEFED, 606-331-2838, Taft, Stettinius & Hollister, 2670 Chancellor Drive, Suite 400 Thomas More Center, Crestview Hills, KY 41017. For NORMAN D. OWENS, AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC., Defendants - Appellees: Michael D. Meuser, Frank T. Becker, 606-255-6676, Harry B. Miller, Jr., 606-255-6676, Robert S. Miller, ARGUED, BRIEFED, 606-255-6676, Miller, Griffin & Marks, 271 W. Short Street, Suite 700 Security Trust Building, Lexington, KY 40507-1292.

For UNITED STATES OF AMERICA, Amicus Curiae: Scott R. McIntosh, BRIEFED, 202-514-4052, U.S. Department of Justice, Appellate Division, Tenth & Pennsylvania Avenue, N.W., Suite 3129 Main Justice Building, Washington, DC 20530. Barbara C. Biddle, 202-514-2541, Room 7124, U.S. Department of Justice, Appellate Staff, Civil Division, Tenth & Pennsylvania

Avenue, N.W., Suite 3631 Main Justice Building, Washington, DC 20530. Mark B. Stern, ARGUED, 202-514-5089, U.S. Department of Justice, Civil Division, 10th & Pennsylvania Avenues, N.W., Suite 7410A, Washington, DC 20530. For SECURITIES AND EXCHANGE COMMISION, Amicus Curiae: Scott R. McIntosh, BRIEFED, 202-514-4052, U.S. Department of Justice, Appellate Division, Tenth & Pennsylvania Avenue, N.W., Suite 3129 Main Justice Building, Washington, DC 20530. Barbara C. Biddle, 202-514-2541, Room 7124, U.S. Department of Justice, Appellate Staff, Civil Division, Tenth & Pennsylvania Avenue, N.W., Suite 3631 Main Justice Building, Washington, DC 20530. For ARTHUR ANDERSEN & COMPANY, ERNST & YOUNG, KPMG PEAT MARWICK AND PRICE WATERHOUSE, ERNST & YOUNG, KPMG, PRICE WATERHOUSE AND COMPANY, Amicus Curiae: Kathryn Oberly, BRIEFED, 202 663-9871, 1200 19th Street N.W., Fourth Floor, Washington, DC 20036.

JUDGES: Before: KEITH and BATCHELDER, Circuit Judges; and CHURCHILL, Senior District Judge. * BATCHELDER, Circuit Judge, delivered the opinion of the court, in which CHURCHILL, Senior District Judge, joined. KEITH, Circuit Judge, delivered a separate opinion concurring in part and dissenting in part.

* The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINIONBY: ALICE M. BATCHELDER

OPINION: [*1489] ALICE M. BATCHELDER, Circuit Judge.

I.

Appellants, the plaintiffs before the District Court, representing a large number of sometime investors, originally sued defendants on November 25, 1987, alleging violations of the securities laws, namely fraud and deceit in the sale of stock under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") n1 and Securities and Exchange Commission Rule 10b-5. n2 Defendants owned "one of the Commonwealth's premier thoroughbred horse farms" (the District Court's characterization, to which we owe every deference) and issued stock in the enterprise in order to raise some thirty million dollars in cash; [**2] others of the named defendants were various legal and financial advisers to the venture. The appellants (or "shareholders") originally purchased their stock when defendants offered it for public sale in 1983.

n1 15 U.S.C. § 78j.

n2 17 C.F.R. § 240.10b-5.

For over three years, the pretrial litigation in the District Court proceeded apace. On June 20, 1991, however, the Supreme Court handed down Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991), which applied a uniform Federal time limit from another section of the 1934 Act to that action and all private § 10(b) actions. Lampf provided a three year period of repose, running from the date of a fraudulent securities contract of sale, or a one year limitation period, running from the date of discovery of the fraud. n3

n3 Prior to Lampf, the Kentucky Blue Sky law provided a three year limitation period for this type of Federal securities action, running from the date of discovery. Ky. Rev. Stat. Ann. § 292.480. Two Circuits had already adopted the Federal one year/three year period adopted in Lampf; others had applied State limitations periods. See Lampf, 111 S. Ct. at 2777 n.1 (citing cases).

[**3]

The District Court, applying Lampf retroactively on the authority of Beam Distilling Corp. v. Georgia, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991), which was announced the same day as Lampf, dismissed the shareholders' claims with prejudice on August 13, 1991. The shareholders did not file what they believed (correctly) would have been a meritless and indeed sanctionable appeal.

In November 1991, Congress passed the FDIC Improvement Act of 1991, ("1991 Act") which, on a plaintiff's motion made within sixty days of the effective date of the statute, December 19, 1991, required the District Courts to reinstate claims which had been [*1490] dismissed as a result of the application of the Federal statute of limitations announced in Lampf. The shareholders filed such a motion on February 11, 1992. While finding that under the statute the shareholders were entitled to have their claims reinstated, the District Court held the statute unconstitutional as applied and denied the motion. Since the portion of the 1991 Act which commands the District Court to reinstate the shareholders' dismissed cause of action violates the doctrine of separation of powers and deprives the defendants

14TH CASE of Level 1 printed in FULL format.

AXEL JOHNSON INC., Plaintiff-Appellee, v. ARTHUR ANDERSEN & CO., Defendant-Appellant, UNITED STATES OF AMERICA, Intervenor.

Docket No. 92-7624

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

6 F.3d 78; 1993 U.S. App. LEXIS 24954; Fed. Sec. L. Rep. (CCH) P97,766; 27 Fed. R. Serv. 3d (Callaghan) 627

December 21, 1992, Argued

September 27, 1993, Decided

SUBSEQUENT HISTORY: [**1] As Amended October 18, 1993.

PRIOR HISTORY: Defendant-appellant appeals the order of the United States District Court for the Southern District of New York, Morris E. Lasker, Judge, granting plaintiff-appellee's Fed. R. Civ. P. 60(b)(6) motion, vacating a judgment dismissing plaintiff-appellee's complaint asserting claims under 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5, and pendent state law claims, and reinstating plaintiff-appellee's complaint pursuant to 15 U.S.C. § 78aa-1.

DISPOSITION: Affirmed.

COUNSEL: SANFORD P. DUMAIN, New York, NY (Melvyn I. Weiss, Deborah Clark-Weintraub, Milberg Weiss Bershad Specthrie & Lerach, New York, NY, of counsel), for Plaintiff-Appellee.

ELIOT LAUER, New York, NY (Bernard V. Preziosi, Jr., Peter Sullivan, Curtis, Mallet-Prevost, Colt & Mosle, New York, NY, of counsel), for Defendant-Appellant.

KAY K. GARDINER, Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney for the Southern District of New York, Gabriel W. Gorenstein, Assistant United States Attorney, New York, NY, Barbara Biddle, Scott R. McIntosh, Appellate Staff, Civil Division, United States Department of Justice, Washington, [**2] D.C., of counsel), filed brief for the United States as intervenor and the Securities and Exchange Commission as amicus curiae in support of appellee.

THEODORE B. OLSON, Washington, D.C. (Theodore J. Boutros, Jr., John K. Bush, Gibson, Dunn & Crutcher, Washington, D.C., of counsel), filed a brief amicus curiae on behalf of Deloitte & Touche, Ernst & Young, and KPMG Peat Marwick.

JUDGES: Before: PIERCE, ALTIMARI, and WALKER, Circuit Judges.

OPINIONBY: WALKER

OPINION: [*79] WALKER, Circuit Judge:

This appeal presents a challenge to the constitutionality of Section 27A of the Securities and Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78aa-1, as applied to reinstate plaintiff-appellee Axel Johnson Inc.'s ("Johnson") claims under § 10(b) of the Act, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5 against defendant-appellant Arthur Andersen & Co. ("Andersen"), which had been dismissed as untimely under the regime of Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991).

[*80] BACKGROUND

In a complaint filed in the United States District Court for the Southern District of New [**3] York (Lasker, J.) on September 29, 1989, Johnson asserted against Andersen § 10(b)/Rule 10b-5 claims, as well as pendent state law claims, related to Andersen's audit of a company Johnson purchased in December of 1982. Under the § 10(b)/Rule 10b-5 statute of limitations doctrine applicable in the Second Circuit when it filed its complaint, which borrowed state-law-fraud limitations periods, see Ceres Partners v. GEL Assocs., 918 F.2d 349, 352-53 (2d Cir. 1990),

20TH CASE of Level 1 printed in FULL format.

CERES PARTNERS, Plaintiff-Appellant, v. GEL ASSOCIATES, GOLLUST, TIERNEY and OLIVER, CONISTON PARTNERS, CONISTON INSTITUTIONAL INVESTORS, GOLLUST and TIERNEY INCORPORATED, KEITH R. GOLLUST, PAUL E. TIERNEY, Jr., and AUGUSTUS K. OLIVER, Defendants-Appellees

No. 390, Docket 89-7666

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

918 F.2d 349; 1990 U.S. App. LEXIS 19741; Fed. Sec. L. Rep. (CCH) P95,639

December 1, 1989, Argued

November 8, 1990, Decided

PRIOR HISTORY:

[**1] Appeal from an order of the United States District Court for the Southern District of New York, Milton Pollack, Judge, dismissing claims for damages under §§ 14(d), 14(e), and 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(d), 78n(e), and 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, on the ground that the claims are barred by the statute of limitations. See 714 F. Supp. 679 (1989).

DISPOSITION: Affirmed.

COUNSEL: Evan L. Gordon, New York, New York (Bangser & Weiss, New York, New York, on the brief), for Plaintiff-Appellant.

Richard F. Ziegler, New York, New York (Thomas G. Dagger, Michael S. Sommer, Cleary, Gottlieb, Steen & Hamilton, New York, New York, on the brief), for Defendants-Appellees.

Daniel L. Goelzer, General Counsel of the Securities and Exchange Commission, Washington, District of Columbia (Jacob H. Stillman, Associate General Counsel, Thomas L. Riesenberg, Assistant General Counsel, Rada L. Potts, Attorney, Paul Gonson, Solicitor, Washington, District of Columbia, of Counsel), filed a brief for Amicus Curiae Securities and Exchange Commission in support of Appellant.

Patricia A. McGovern, Harris J. Amhowitz, Leonard P. Novello, Eldon Olson, New York, New York (Carl D. Liggio, New York, New [**2] York, of Counsel), filed a brief for Amici Curiae Ernst & Young, Coopers & Lybrand, Peat Marwick Main & Co., and Price Waterhouse, in support of Appellees.

JUDGES: Kearse, Altimari, and Mahoney, Circuit Judges.

OPINIONBY: KEARSE

OPINION: [*350] KEARSE, Circuit Judge

Plaintiff Ceres Partners ("Ceres") appeals from an order of the United States District Court for the Southern District of New York, Milton Pollack, Judge, summarily dismissing its complaint for damages against defendants GEL Associates ("GEL"), et al., for violation of §§ 10(b), 14(d), and 14(e) of the Securities Exchange Act of 1934, as amended by the Williams Act, Pub. L. No. 90-439, § 3, 82 Stat. 455 (1968) (collectively "1934 Act" or "Act"), 15 U.S.C. §§ 78j(b), 78n(d), and 78n(e) (1988), and Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. § 240.10b-5 (1989). Borrowing the statute-of-limitations period that would be applied to such claims in accordance with New York law, the district court found that Ceres's claims were time-barred. 714 F. Supp. 679 (1989). On appeal, all of the parties urge us to abandon this Circuit's established rule that the statute of limitations applicable to claims under §§ 10(b) [**3] and 14 of the 1934 Act is that provided by the most analogous state statute, and instead to adopt a uniform federal limitary period on such claims. They disagree, however, on what period should be selected. Ceres contends that a five-year period should be selected, and that on this basis the judgment dismissing the complaint should be vacated. As discussed below, the judgment would be affirmed if we were to follow this Circuit's

128TH CASE of Level 1 printed in FULL format.

THE FLORIDA BAR RE: ADVISORY OPINION - NONLAWYER PREPARATION OF LIVING TRUSTS

No. 78,358

SUPREME COURT OF FLORIDA

613 So. 2d 426; 1992 Fla. LEXIS 2159; 18 Fla. Law W. S 23

December 24, 1992, Decided

SUBSEQUENT HISTORY: [**1] Rehearing Denied March 4, 1993. Released for Publication March 4, 1993.

PRIOR HISTORY: Original Proceeding - Rules Regulating The Florida Bar

COUNSEL: Joseph R. Boyd, Chairman, Standing Committee on UPL, of Boyd & Branch, Tallahassee, Florida; Lori S. Holcomb, Assistant UPL Counsel, The Florida Bar, Tallahassee, Florida; Janet E. Messervey, Vice-Chair, Standing Committee on UPL, Orlando, Florida; Rohan Kelley, Fort Lauderdale, Florida and Joseph W. Fleece of Belcher & Fleece, St. Petersburg, Florida, for The Real Property, Probate & Trust Law Section of The Florida Bar, for Petitioner.

Arthur J. England, Jr. of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida, for The American Institute of Certified Public Accountants, Florida Institute of Certified Public Accountants, Arthur Andersen & Co., Coopers & Lybrand, Deloitte & Touche, Ernst & Young, KPMG Peat Marwick and Price Waterhouse; Kenneth R. Hart of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, Florida, for The Florida Institute of Certified Public Accountants; J. Thomas Cardwell, Jr. and Virginia B. Townes of Akerman, Senterfitt & Eidson, Orlando, Florida, for The Florida Bankers Association; J. Robert [**2] McClure, Jr. of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Tallahassee, Florida, for The Florida Association of Life Underwriters; David R. McCallister, Wesley Chapel, Florida, for Family Living Trusts, Inc.; Will H. Halker, Jr. of Halker, Kelley & Sebben, Sacramento, California, for Living Trusts America, National Family Trusts and Mid-America Living Trust Associates, Inc.; Deborah M. Chalfie, Washington, D.C., for HALT; and James Konarske, owner of Jimmy K. & Associates, Zephyrhills, Florida, Interested Parties.

JUDGES: BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

OPINIONBY: PER CURIAM

OPINION:
[*426] PER CURIAM.

Pursuant to rule 10-7.1(b) of the Rules Regulating The Florida Bar, Ira C. Hatch, on behalf of American Family Living Trust, petitioned The Florida Bar Standing Committee on the Unlicensed Practice of Law (the Standing Committee) for an advisory opinion on the following question:

Whether it constitutes the unlicensed practice of law for a corporation or other nonlawyer to draft living trusts and related documents for another where the information to be included in the living trust is gathered by nonlawyer agents of the corporation or by the nonlawyer and she [**3] completed documents are reviewed by a member of The Florida Bar prior to execution.

[*427] We have jurisdiction to review the proposed advisory opinion pursuant to rule 10-7.1(g) of the Rules Regulating The Florida Bar and article V, section 15 of the Florida Constitution.

The Standing Committee received similar requests from a number of other parties, and responded by holding two hearings where both oral and written testimony were received. Following the hearings, the Standing Committee voted to issue the proposed opinion which finds that nonlawyer companies selling living trusts are engaging in the unlicensed practice of law and that the public is either actually being harmed or has the potential of being harmed by this practice.

The proposed opinion describes the process of creating a living trust as involving five steps: 1) gathering the necessary information; 2) assembling

133RD CASE of Level 1 printed in FULL format.

RICHARD'S AUTO CITY, INC., Plaintiff-Respondent, v. DIRECTOR, DIVISION OF TAXATION, Defendant-Appellant.

A-54 September Term 1994

SUPREME COURT OF NEW JERSEY

140 N.J. 523; 659 A.2d 1360; 1995 N.J. LEXIS 266

January 17, 1995, Argued

June 21, 1995, Decided

PRIOR HISTORY: [***1]

On certification to the Superior Court, Appellate Division, whose opinion is reported 270 N.J. Super. 92 (1994).

DISPOSITION: The judgment of the Appellate Division is reversed, and the order of the Tax Court, granting summary judgment in favor of the Director of the Division of Taxation, is reinstated.

SYLLABUS:

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

RICHARD'S AUTO CITY,INC. V. DIRECTOR,DIVISION OF TAXATION (A-54-94)

Argued January 17, 1995 - Decided June 21, 1995

HANDLER,J., writing for a unanimous Court.

The issue on appeal is whether certain provisions of the Corporation Business Tax Act (CBT), specifically N.J.S.A.54:10A-4(k), permit the net-operating losses in past tax years by a corporation that has been merged into a successor corporation to be carried over and deducted by the surviving corporation in a subsequent tax year. Also implicated is the validity of N.J.A.C.18:7-5.13(b),a regulation adopted [***2] by the Director of the Division of Taxation to implement the NOL carryover provisions of the CBT.

Richard's Auto City, Inc. (Auto City), a New Jersey corporation formed in 1973, is an automobile dealership in Freehold Township. Catena, Inc. (Catena), incorporated in 1983, was the leasing company affiliated with Auto City, providing lease financing for Auto City's customers. Catena began its operations in 1983 at the Auto City location. Richard Catena was the sole stockholder of each corporation. In January 1984, Richard Catena transferred 100% of his shares of stock in Catena to Auto City, making Catena a wholly-owned subsidiary of Auto City.

Over the next few years, Catena incurred substantial net-operating losses (NOLs), totalling $ 1,574,294, for the 1984, 1985, and 1986 tax years. In late 1986, pursuant to a plan of merger, Catena merged into Auto City. A Certificate of Merger filed with the Secretary of State on December 19, 1986 identified Auto City as the survivor corporation. Following the merger, the leasing programs that Catena previously offered continued in the same manner under Auto City's leasing department.

In its 1986 Corporate Business Tax Return, Auto City claimed [***3] as a deduction the NOLs Catena had incurred during the tax years prior to the merger. By notice of assessment dated April 17, 1989, the Director of the Division of Taxation disallowed the deduction and assessed Auto City $ 88,517 in additional taxes. The Director found that the losses actually had not been incurred by Auto City's business operations, but rather the losses were sustained by the merged corporation that no longer existed. The Director based his determination on administrative regulation, N.J.A.C. 18:7-5.13(b). The Director also imposed a late payment penalty and interest charges through November 30, 1989. The Director's decision was reaffirmed by a final determination letter dated November 16, 1989, which reduced the penalty and interest charges to the statutory minimum.

Auto City filed a complaint with the Tax Court contesting the Director's final determination. The Tax Court granted the Director's cross-motion for summary judgment and dismissed Auto City's complaint. On appeal, the Appellate Division reversed and remanded the matter to the Tax Court for entry of judgment in favor of Auto City. The Appellate Division found that the administrative regulation was [***4] invalid because it was inconsistent with the enabling statute, went beyond the legislative scheme, and imposed a restriction that was neither intended or authorized.

The Supreme Court granted the Director's petition for certification.

HELD: Net-operating losses incurred in past tax years by a corporation that has been merged into a successor corporation are not permitted, under the Corporation Business Tax Act, to be carried over and deducted by the surviving corporation in a subsequent tax year.

1. Agency regulations are presumptively valid and should not be invalidated unless they violate the enabling act or frustrate express or implied legislative intent. Courts generally accord substantial deference to the agency's interpretation of the statute the agency is charged with enforcing. Nonetheless, an administrative agency cannot extend a statute to give it a greater effect than its language permits. (pp. 4-7)

2. The language of the critical provisions of the CBT is not clear and unambiguous, does not admit of only one interpretation, and does not plainly authorize a surviving corporation in a merger to use the NOL deductions of an acquired corporation. By its express [***5] terms, N.J.S.A.54:10A-4(k)(6) does not address the treatment of NOLs in mergers and other corporate reorganizations. The Director's regulation comports with the basic meaning of the CBT. Nothing in the language of section 4(k)(6) permits one taxable entity to adopt the tax attributes of another entity alter a statutory merger. The language of the statute does not support the imputation of a legislative intent or the implication of statutory authority that would allow the transfer of tax deductions from an acquired corporation to the surviving corporation alter a merger. (pp 7-10)

3. A review of the legislative history of the CBT does not support the conclusion that the Legislature intended to authorize the deduction of an NOL by a corporation that did not sustain the loss simply because it acquired through merger the corporation that incurred the loss. In addition, the Court cannot conclude that the 1939 Internal Revenue Code, as interpreted and applied, shaped the Legislature's purpose in providing for a net loss carryover deduction. (pp. 10-19)

4. There is no reason to read the New Jersey Corporation Business Act, specifically N.J.S.A.14A:10.6 in pari materia (in [***6] conjunction) with the CBT, specifically section 4(k)(6). The two acts deal with different subjects (corporate law versus tax law), have different purposes, and are clearly not part of a single comprehensive plan. (pp. 19-23)

6. Auto City has failed to sustain its burden of proving that N.J.A.C. 18:7-5.13(b) is invalid. That regulation applies retroactively to the effective date of the CBT. Thus, the regulation applies, as the statute applies, to any taxable year ending alter June 30, 1984.

Judgment of the Appellate Division is REVERSED, and the order of the Tax Court, granting summary judgment in favor of the Director of the Division of Taxation, is REINSTATED.

CHIEF JUSTICE WILENTZ and JUSTICES POLLOCK, O'HERN, GARIBALDI, STEIN and COLEMAN join in JUSTICE HANDLER'S opinion.

COUNSEL: Margaret A. Holland, Deputy Attorney General, argued the cause for appellant (Deborah T. Poritz, Attorney General of New Jersey, attorney; Joseph L. Yannotti, Assistant Attorney General, of counsel).

Robert J. Kipnees argued the cause for respondent (Greenbaum, Rowe, Smith, Ravin & Davis, attorneys; Mr. Kipnees and Thomas C. Senter, of counsel and on the brief).

Michael A. Guariglia submitted [***7] a letter brief on behalf of amici curiae Ernst & Young, Coopers & Lybrand and Deloitte & Touche (McCarter & English, attorneys).

JUDGES: The opinion of the Court was delivered by HANDLER, J. CHIEF JUSTICE WILENTZ and JUSTICES POLLOCK, O'HERN, GARIBALDI, STEIN and COLEMAN join in JUSTICE HANDLER'S opinion.

OPINIONBY: HANDLER

OPINION: [*527]

13TH CASE of Level 1 printed in FULL format.

DAVID J. CHECKOSKY, NORMAN A. ALDRICH, PETITIONERS v. SECURITIES AND EXCHANGE COMMISSION, RESPONDENT; IN RE: APPLICATION OF DAVID J. CHECKOSKY AND NORMAN A. ALDRICH FOR THE PERPETUATION OF CERTAIN TESTIMONY AND THE PRESERVATION OF OTHER EVIDENCE; IN RE: DAVID J. CHECKOSKY AND NORMAN A. ALDRICH, PETITIONERS

No. 92-1396, No. 92-5158, No. 92-1214

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

23 F.3d 452; 1994 U.S. App. LEXIS 11735; Fed. Sec. L. Rep. (CCH) P98,229; 29 Fed. R. Serv. 3d (Callaghan) 300; 306 U.S. App. D.C. 144

October 26, 1993, Argued

May 20, 1994, Decided

PRIOR HISTORY: [**1] No. 92-1396, Petition for Review of an Order of the Securities and Exchange Commission. No. 92-5158, Appeal from the United States District Court for the District of Columbia. (92ms0103). No. 92-1214, On Petition for a Writ of Mandamus.

COUNSEL: Geoffrey F. Aronow argued the cause for petitioners. With him on the briefs was Andrew T. Karron. Jay Kelly Wright and Samuel A. Thumma entered an appearance.

Susan Ferris Wyderko, Assistant General Counsel, Securities and Exchange Commission, argued the cause for respondent. With her on the briefs were Paul Gonson, Solicitor, Richard M. Humes, Attorney, Paul P. Andrews, Senior Counsel, and Richard H. Walker, Regional Administrator, Securities and Exchange Commission. Jeffrey R. Zuckerman and Henry Klehm, III, Attorneys, Securities and Exchange Commission, entered an appearance in Nos. 92-5158 and 92-1214. James Robert Doty entered an appearance in No. 92-1396.

Kathryn A. Oberly was on the brief for amici curiae Arthur Andersen & Co.; Deloitte & Touche; Ernst & Young; and KPMG Peat Marwick.

Arthur F. Mathews and Michael R. Klein were on the brief for amicus curiae American Civil Liberties Union.

JUDGES: Before: SILBERMAN and RANDOLPH, [**2] Circuit Judges, and JOHN W. REYNOLDS, * District Judge.

* Of the United States District Court for the Eastern District of Wisconsin, sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion PER CURIAM. Circuit Judge SILBERMAN filed a separate opinion. Circuit Judge RANDOLPH filed a separate opinion. District Judge REYNOLDS filed a separate opinion, concurring in part and dissenting in part.

OPINIONBY: PER CURIAM; SILBERMAN; RANDOLPH

OPINION: [*454] PER CURIAM: The case is remanded to the Commission for a more adequate explanation of its interpretation of Rule 2(e)(1)(ii) and its application to this case. The court rejects unanimously, as per Part V of Judge Randolph's opinion, petitioners' challenge to the regularity of the Commission's proceedings.

So Ordered.

SILBERMAN, Circuit Judge: The Commission suspended petitioners, partners in a national accounting firm, for "improper professional conduct" under Rule 2(e)(1)(ii). As I cannot determine from the order just what the Commission is using as its standard for improper professional conduct, I think the appropriate course is to remand (which we do) for the Commission to clarify its position before we substantively review the order. [**3] See Philadelphia Gas Works v. FERC, 300 U.S. App. D.C. 374, 989 F.2d 1246, 1251 (D.C. Cir. 1993).